

A Proposed Approach to Judicial Takings

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I. INTRODUCTION

Consider a brief scenario.¹ Jacob owns forty acres of pristine property near the Green Mountains in Vermont and looks forward to building a home there after he retires. But to his dismay, the State of Vermont decides to build a nuclear power plant on his land. Of course, Jacob demands payment for such an imposition. The State, though, refuses to compensate him, and the Vermont Supreme Court upholds that refusal. No payment is required, rules the court, because an implicit easement—the power plant easement—authorizes the State to build power plants on private land without providing compensation. Jacob appeals his case to the U.S. Supreme Court on the grounds that the state has taken from him a property right—the right to exclude nuclear power plants from his land—without just compensation in violation of the Fifth Amendment.

Assuming that the power plant easement did not exist before the Vermont Supreme Court's decision, the court has altered property law in such a way as to take from Jacob a property right. If the Vermont legislature had enacted the power plant easement by statute, without a doubt the Takings Clause of the Fifth Amendment would require it to pay him just compensation. But because a court took his property, it is unclear whether the Supreme Court would apply the Fifth Amendment to Jacob's case.

Recently, in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection (STBR)*,² the Supreme Court heard a judicial takings claim based on facts analogous to the hypothetical situation described above. Six justices agreed that the Constitution limits the ability of state courts to redefine property rights. But only four of the six justices wanted to apply the Takings Clause to the case. The other two preferred to apply the Due Process Clause. Furthermore, the justices disagreed over whether the remedy for a judicial taking should involve compensation for the property owner or invalidation of the taking court's decision. In short, the Court made very little progress in establishing a definitive approach to judicial takings claims.

A clearly defined approach to judicial takings claims is desirable for several reasons. First, *STBR* provides lower courts with very little guidance for deciding judicial takings claims. After *STBR*, it is still unclear how courts should analyze

¹ With the addition of a few embellishments, this hypothetical was proposed by Justice Breyer during oral argument in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*. Transcript of Oral Argument at 53, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592 (2010) (No. 08-1151).

² 130 S. Ct. 2592 (2010).

such claims or what remedies they should provide. Second, this uncertainty might encourage property owners to bring tenuous takings claims on the off chance that the Supreme Court will resolve the issue in their favor.³ Third, absent a clearly defined test to which they can refer, state judges cannot know when or to what extent they can modify state property law without effecting a judicial taking of private property. This ambiguity may impair state judges' ability to resolve state property law issues.

This Note proposes a test that courts could apply to judicial takings cases. It attempts to reconcile the competing positions in *STBR* and suggests a two-pronged approach with corresponding remedies. Before describing the proposed test, though, this Note addresses background information crucial to understanding *STBR*, including a brief overview of the Supreme Court's takings jurisprudence and a description of prior Supreme Court decisions pertinent to the judicial takings issue. It then summarizes the Court's decision in *STBR*, focusing in particular on the competing opinions of Justices Scalia and Kennedy. Next, it critiques four scholars' suggested approaches to judicial takings. Finally, this Note suggests a two-pronged approach to judicial takings and concludes with a brief example illustrating how this proposed test would apply to a well-known case.

II. OVERVIEW OF THE SUPREME COURT'S TAKINGS JURISPRUDENCE

A brief overview of the Supreme Court's takings jurisprudence will help place judicial takings in the broader context of takings law in general. The most important text for all takings questions is the Fifth Amendment, which demands that "private property [not] be taken for public use, without just compensation."⁴ Significantly, the Constitution does not prohibit the government from taking private property; rather, it requires that when the government takes private property it pay compensation.⁵ The primary reason for the Takings Clause, according to the Supreme Court, is to prevent "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."⁶

Most Fifth Amendment cases involve the question of what constitutes a taking.⁷ The Supreme Court has identified two main types of takings: (1)

³ Since deciding *STBR* in 2010, the Court has received at least four petitions for certiorari involving the judicial takings issue. See Ian Fein, Note, *Why Judicial Takings Are Unripe*, 38 *ECOLOGICAL L.Q.* 749, 752 n.10 (2011) (citing denials of petitions for certiorari).

⁴ U.S. CONST. amend. V.

⁵ See *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 314 (1987) (stating that the Fifth Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power").

⁶ See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

⁷ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 641 (3d ed. 2006).

confiscations or physical invasions of property and (2) regulatory takings.⁸ Confiscations and physical invasions are fairly straightforward.⁹ The second category of takings, regulatory takings, is somewhat more complicated. In the famous *Pennsylvania Coal* case, Justice Holmes observed that governments would go bankrupt if they were required to reimburse property owners for every regulation that affected their properties' value.¹⁰ Nonetheless, the Court recognized that some regulations diminish property values to such an extent that they essentially confiscate the property.¹¹ The standard, according to Justice Holmes, is that a regulation of private property is a taking when it "goes too far."¹² The Court has wrestled with how to determine when exactly a regulation "goes too far" for almost a century.¹³ Justice Holmes emphasized that the test was one of fact.¹⁴ Later cases reinforced the ad hoc nature of the test.¹⁵

In addition to the ad hoc test, the Supreme Court has identified two categories of regulations that are per se takings. First, a regulation that requires a property owner to submit to a physical invasion of private property, no matter how small, is a taking.¹⁶ Second, a regulation that deprives a property owner of "all economically beneficial uses" of his property is a taking.¹⁷

⁸ See *Lingle*, 544 U.S. at 537.

⁹ When the federal government "possessed and operated" a coal mine as part of its effort to prevent a national coal-miners' strike, the Court easily found that such a confiscation had taken the coal mine for purposes of the Fifth Amendment. See *United States v. Pewee Coal Co.*, 341 U.S. 114, 115-17 (1951). When the government occupied a warehouse leased to General Motors, the Court held such a physical invasion to be a Fifth Amendment taking. See *United States v. Gen. Motors Corp.*, 323 U.S. 373, 374-78 (1945).

¹⁰ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

¹¹ *Id.*

¹² *Id.* at 415.

¹³ See CHEMERINSKY, *supra* note 7, at 646.

¹⁴ *Pa. Coal*, 260 U.S. at 413.

¹⁵ See *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986) (observing that "we have eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case"). The Court has identified several factors relevant to determining whether a regulation goes so far as to effect a taking. See *Pa. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). When analyzing a regulatory takings question, the Court will examine "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.* The Court will also inquire into the "character of the governmental action." *Id.* It will more likely find a taking when the regulation looks like a "physical invasion by government" than when the regulation is just a "public program adjusting the benefits and burdens of economic life to promote the common good." *Id.*

¹⁶ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). Under this rule, a state law that required apartment building owners to allow a cable television company to install cable facilities on their buildings was a taking. *Id.* at 438.

¹⁷ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992). In *Lucas*, the Court faced the question of whether a South Carolina law that prevented the plaintiff from building a residence on his beachfront property was a taking. *Id.* at 1006-07. Since the law rendered the plaintiff's property valueless, *id.* at 1020, the Court held that the regulation was a taking

The two main categories of takings the Supreme Court has identified—confiscations or physical invasions and regulatory takings—all involve actions by the legislative or executive branches of government. Prior to 2010, the Supreme Court had not, in a majority opinion, directly engaged the issue of whether the judicial branch could accomplish a Fifth Amendment taking.¹⁸ In a few cases, though, the Court addressed the question in dicta or in a minority opinion. The next Part discusses those cases.

III. JUDICIAL TAKINGS IN THE SUPREME COURT BEFORE *STBR*

Before *STBR*, the Supreme Court's position on a judicial takings doctrine was ambiguous. Dicta in two early cases, both decided around the turn of the twentieth century, appeared to support the doctrine. Three subsequent cases, though, appeared to oppose it. Then a concurring opinion by Justice Stewart revived the doctrine. Finally, in the last two decades of the twentieth century, the doctrine received support from dicta in two majority opinions and in a dissent from a denial of certiorari authored by Justice Scalia.

A. Two Early Cases Supporting a Judicial Takings Doctrine

In two cases, decided in 1897 and 1905, the Supreme Court appeared to support a judicial takings doctrine. In neither case did the Court address the judicial takings issue directly. Nonetheless, dicta in the two opinions seemed to support applying the Takings Clause to the judiciary.

The first case was *Chicago, Burlington & Quincy Railroad Co. v. Chicago*.¹⁹ The biggest issue facing the Court was whether the Due Process Clause of the Fourteenth Amendment required a state to award compensation when it took private property for public use (i.e., whether the Takings Clause should be incorporated into the Fourteenth Amendment).²⁰ The Court answered the question in the affirmative.²¹ In doing so, it did not distinguish between takings performed by the legislative, executive, or judicial branches. According to the Court: “[T]he prohibitions of the [Fourteenth] [A]mendment refer to all the instrumentalities of the state,—to its legislative, executive, and judicial

unless the State could point to “background principles of nuisance and property law” that prohibited the plaintiff from building on his land, *id.* at 1031–32.

¹⁸ See D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. RICH. L. REV. 903, 911 (2011).

¹⁹ 166 U.S. 226 (1897). In 1880, the Chicago City Council enacted an ordinance that condemned part of a right-of-way belonging to the Chicago, Burlington & Quincy Railroad Company for use as a city street. *Id.* at 230. Under Illinois law, a jury was required to award just compensation for the condemnation. *Id.* at 229. The jury awarded the impressive sum of \$1. *Id.* at 230. The railroad, understandably unsatisfied with that amount, appealed.

²⁰ *Id.* at 235.

²¹ *Id.* at 241. This was the first case to incorporate a provision of the Bill of Rights into the Fourteenth Amendment. See CHEMERINSKY, *supra* note 7, at 640 & n.1.

authorities.”²² Admittedly, a legislative body—the Chicago City Council—performed the taking in the case.²³ Nonetheless, the Court’s language lent at least some support to a doctrine of judicial takings. Under *Chicago, Burlington & Quincy Railroad*, a judicial opinion that redefined property rights in such a way as to deprive a citizen of property without just compensation appeared to violate the Fifth Amendment as incorporated by the Fourteenth.²⁴

Eight years later, the Supreme Court again issued an opinion that seemed to indirectly support a judicial takings doctrine. In *Muhlker v. New York & Harlem Railroad Co.*,²⁵ the Court based its holding upon the Contracts Clause. But according to Professor Barton Thompson, the plurality opinion “strongly implied that courts could not constitutionally strip owners of their property by the expediency of overruling prior precedents.”²⁶ Indeed, Justice Holmes in dissent recognized that the case was really about property rights and that by applying the Contract Clause the Court contorted the real issue.²⁷ In short, *Muhlker* implied that a state court could accomplish a Fifth Amendment taking by changing state property law.

Chicago, Burlington & Quincy Railroad and *Muhlker* seemed to support a doctrine of judicial takings. But in the ensuing decades, the Supreme Court did not indicate further support for such a doctrine.²⁸ Instead, the Court several times affirmed the ability of state courts to alter property law without implicating the Fifth Amendment.

B. Three Cases Opposing a Judicial Takings Doctrine

In three notable cases after *Muhlker*, the Supreme Court indicated that state courts should be allowed to change state property law without interference. In

²² *Chi., Burlington & Quincy R.R.*, 166 U.S. at 233.

²³ *See id.* at 230.

²⁴ *See id.* at 233–34; *see also* Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1463 (1990); Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 426.

²⁵ 197 U.S. 544 (1905). This case, like *Chicago, Burlington & Quincy Railroad*, involved a railroad. A New York statute had instructed the railroad to elevate its railway running along Park Avenue. *Id.* at 545–46. A property owner, one Henry Muhlker, sued to enjoin the railroad from building an elevated railway in front of his building unless it compensated him for his “easements of light, air, and access.” *See id.* at 544–45. Muhlker’s case seemed sound. In a series of earlier cases—the *Elevated Railway Cases*—the New York Court of Appeals had held that owners of property along a public street held easements of light, air, and access and must be compensated when elevated railways disturbed those easements. *See id.* at 564–68. Nonetheless, the New York Court of Appeals distinguished the *Elevated Railroad Cases* and ruled against Muhlker. *See id.* at 561.

²⁶ *See* Thompson, *supra* note 24, at 1464.

²⁷ *See Muhlker*, 197 U.S. at 575 (Holmes, J., dissenting) (“What the plaintiff claims is really property, a right *in rem*. It is called contract merely to bring it within the contract clause of the Constitution.”).

²⁸ *See* Thompson, *supra* note 24, at 1465.

Tidal Oil Co. v. Flanagan, the Court, in declining to exercise jurisdiction, stated that “[t]he mere reversal by a state court of its previous decision, as in this case before us, whatever its effect upon contracts, does not . . . violate any clause of the federal Constitution.”²⁹

A few years later, in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*,³⁰ the Supreme Court reaffirmed the position it had taken in *Tidal Oil*. Although it ruled in favor of the property owner on due process grounds,³¹ the Court emphasized that state courts were free to change the common law as they saw fit.³² In a significant passage, the Court stated that “[t]he process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law.”³³ The Court went on to explain that “[s]tate courts . . . may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions.”³⁴ Such language seemed to leave little room for a judicial takings doctrine.

Finally, in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*,³⁵ the Supreme Court further entrenched its position that it would not find a taking when a state court changed state property law. Writing for a unanimous Court, Justice Cardozo stated that a state court was free to overrule an earlier decision retroactively.³⁶ A state court “may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of

²⁹ 263 U.S. 444, 455 (1924). The defendant, Tidal Oil, received title to eighty acres of land from its fourteen-year-old Native American owner, Robert Marshall. *Id.* at 448. An Oklahoma district court had previously granted majority rights to Marshall (he was married!), and the same district court upheld the validity of the transfer to Tidal Oil when challenged by Marshall’s guardian. *Id.* Later, after Marshall attained the age of majority, he deeded the land to the plaintiff, Flanagan. *Id.* Flanagan sued Tidal Oil to quiet title to the land, the district court ruled in his favor, and the Oklahoma Supreme Court affirmed because Marshall had been a minor when he deeded the land to Tidal Oil. *Id.* at 449. Tidal Oil appealed to the U.S. Supreme Court, arguing that it had been deprived of its land without due process of law in violation of the Fourteenth Amendment. *See id.*

³⁰ 281 U.S. 673 (1930). The Missouri Supreme Court had held that the state tax commission did not have the power to grant relief from a discriminatory tax assessment. *Id.* at 675–76. In accordance with that earlier case, the appellant sued in a Missouri court to recover taxes it alleged were discriminatory. *Id.* at 674. But in *Brinkerhoff-Faris*, the Court reversed its earlier opinion and declared that the proper manner of challenging a discriminatory tax assessment was by filing a complaint with the tax commission. *Id.* at 675–76. By that time the deadline for filing a complaint had passed, so the appellant was left without an avenue for obtaining a remedy. *Id.* at 677.

³¹ *See id.* at 678.

³² *See id.* at 682.

³³ *Id.* at 681 n.8.

³⁴ *Id.*

³⁵ 287 U.S. 358 (1932). In *Great Northern Railway*, the Supreme Court of Montana had overruled an earlier decision in which it had held that the railroad commission could retroactively adjust freight charges. *Id.* at 359–61.

³⁶ *Id.* at 365–66.

declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning.”³⁷ According to Justice Cardozo, a state court’s decision to overrule itself either prospectively or retroactively “may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature.”³⁸

In these three cases—*Tidal Oil*, *Brinkerhoff-Faris*, and *Great Northern Railway*—the Supreme Court indicated that it would not find a judicial taking when a state court redefined property rights. To the contrary, the Court declared that state courts were free to change the common law as they saw fit. “Thus,” according to one prominent author, “by the end of the New Deal, the concept of judicial takings seemed dead.”³⁹

C. Justice Stewart’s Concurring Opinion in *Hughes v. Washington*

In 1967, the judicial takings concept received a boost from a concurring opinion authored by Justice Potter Stewart in *Hughes v. Washington*.⁴⁰ Justice Stewart proposed that a judicial taking be found when a state court suddenly and unpredictably changed state property law.⁴¹ His suggested approach is worth quoting at length:

To the extent that [a state court decision] arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a *sudden change in state law, unpredictable in terms of the relevant precedents*, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property

³⁷ *Id.* at 365.

³⁸ *Id.*

³⁹ Thompson, *supra* note 24, at 1467; *cf.* Barros, *supra* note 18, at 910–11 (arguing that these cases should not be seen as opposing a judicial takings doctrine because they involved private-private transfers, not private-public transfers).

⁴⁰ 389 U.S. 290 (1967). A littoral landowner, Stella Hughes, argued that all accretions (land gained through gradual sediment deposits along the shore) belonged to her. *Id.* at 290–91. Such was the rule under federal law. *Id.* at 291, 293. But according to the Washington Supreme Court, Washington’s state constitution established a rule that all accretions belonged to the state. *Id.* at 291. The Supreme Court’s majority opinion framed the issue as whether federal or state law should control. *Id.* The majority held that federal law controlled because Mrs. Hughes had derived her title from a federal grant. *Id.* at 291–93. The accretions therefore belonged to Mrs. Hughes. *Id.* at 291. Justice Stewart concurred with the majority, but he would have approached the case differently. *Id.* at 294–95 (Stewart, J., concurring). He contended that because property law is a matter of state law, Washington law governed Mrs. Hughes’s right to accretions, regardless of whether she could trace her title to a grant from the United States. *Id.* at 295. But Justice Stewart suggested that Mrs. Hughes could prevail under another theory, that of a judicial taking. *See id.* at 298.

⁴¹ *See id.* at 296–97.

without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.⁴²

Whether Justice Stewart was grounding his analysis on the Takings Clause or on the Due Process Clause is somewhat unclear. Some of his language pointed to Takings Clause considerations,⁴³ and some of his language suggested Due Process considerations.⁴⁴

Significantly, Justice Stewart declared that two considerations were irrelevant to his test: whether the state actor viewed its decision as a taking and whether a legislature or a court performed the taking.⁴⁵ Under Justice Stewart's analysis, a state court decision that unpredictably changed state property law in such a way as to deprive a citizen of his or her property was just as much a taking as was an exercise of eminent domain by a state legislature.⁴⁶

A federal district court has twice used Justice Stewart's unpredictability test.⁴⁷ The Supreme Court, however, never adopted it. After *Hughes*, the Supreme Court's position on judicial takings remained unclear.

D. Judicial Takings After Hughes

In 1980, the Supreme Court confronted a prime opportunity for applying Justice Stewart's unpredictability test. Six years earlier, the California Supreme Court had held that the owner of a private shopping center could exclude certain

⁴² *Id.* at 296–97 (emphasis added).

⁴³ *See id.* at 296 (reasoning that “if it cannot reasonably be said that the littoral rights of upland owners were terminated in 1889, then the effect of the decision now before us is to take from these owners, without compensation, land deposited by the Pacific Ocean from 1889 to 1966”).

⁴⁴ *See id.* at 296 (arguing that the Court should not defer to a state court decision “to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents”); *see also* Timothy M. Mulvaney, *The New Judicial Takings Construct*, 120 YALE L.J. ONLINE 247, 253 (2011), <http://yalelawjournal.org/images/pdfs/946.pdf> (contending that Stewart's opinion “arguably” supports applying the Due Process Clause to a judicial takings claim, but conceding that “it is not entirely clear whether Justice Stewart was relying upon due process canons, takings canons, or some hybrid of the two”).

⁴⁵ *See Hughes*, 389 U.S. at 298 (Stewart, J., concurring).

⁴⁶ *See id.* (noting that “the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a state, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate”). Applying his test to the facts of the case, Justice Stewart observed that the Washington state constitution did not unambiguously state that all accretions belonged to the state. *Id.* at 296. He cited an earlier case in which the Washington Supreme Court had interpreted the constitution to mean that littoral landowners received title to accretions. *Id.* at 297. According to Justice Stewart, by rejecting its earlier decision and reinterpreting the state constitution, the Washington Supreme Court “effected an unforeseeable change in Washington property law.” *Id.* Since it did not compensate Mrs. Hughes for the loss of her land, the court took Mrs. Hughes's property in violation of the Due Process Clause of the Fourteenth Amendment. *Id.* at 298.

⁴⁷ *See infra* Part IV.

types of speech from his premises.⁴⁸ In 1979, the court reversed itself, holding that the owner of the Pruneyard Shopping Center could not exclude high school students soliciting support for a political cause.⁴⁹ The case seemed perfect for a judicial takings claim. Using Justice Stewart's test, the property owner could have argued that the California Supreme Court had taken from him a property right—his right to exclude—that had been established by the previous case. The California Supreme Court's decision certainly seemed to be "a sudden change in state law, unpredictable in terms of the relevant precedents."⁵⁰ If the property owner could have convinced the Supreme Court to adopt Justice Stewart's test, he should have won. But the owner did not frame his argument in terms of a judicial taking.⁵¹

The Supreme Court's majority opinion also did not address the judicial takings issue. The Court treated the case like a normal regulatory takings case, with the taking effected by the California Constitution.⁵² The Court held that the regulation did not go far enough to constitute a taking because the shopping center owner's loss of his right to exclude did not "unreasonably impair the value or use" of his property.⁵³

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*,⁵⁴ decided the same year as *Pruneyard*, the Supreme Court employed language that seemed to support a judicial takings doctrine. Under Florida law, as construed by the Florida Supreme Court, county circuit court clerks were required to deposit interpleader funds into interest-bearing accounts.⁵⁵ The interest accruing on those funds belonged to the county.⁵⁶ The receiver for the creditors of Webb's Fabulous Pharmacies challenged the law as a taking of private property, but the Florida Supreme Court upheld the law. It held that no taking had occurred because an interpleader fund is public money while it is deposited with the court.⁵⁷

The U.S. Supreme Court reversed.⁵⁸ It held, in a unanimous opinion authored by Justice Blackmun, that an interpleader fund is private property.⁵⁹

⁴⁸ See *Diamond v. Bland*, 521 P.2d 460, 463 (Cal. 1974), *cert. denied*, 419 U.S. 885 (1974).

⁴⁹ See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 77–78 (1980).

⁵⁰ *Hughes*, 389 U.S. at 296 (Stewart, J., concurring).

⁵¹ Brief of Appellants at 9–10, *Pruneyard*, 447 U.S. 74 (No. 79-289) Rather, the owner argued that his constitutional rights under the First, Fifth, and Fourteenth Amendments should trump the California statutory right of access.

⁵² See *Pruneyard*, 447 U.S. at 82–83.

⁵³ See *id.* at 83.

⁵⁴ 449 U.S. 155 (1980).

⁵⁵ See *id.* at 155–56, 160.

⁵⁶ See *id.* at 160.

⁵⁷ See *id.* at 158–59.

⁵⁸ See *id.* at 155.

⁵⁹ See *id.* at 161.

The statute took private property by treating it like public property.⁶⁰ Although a statute accomplished the taking in *Webb's*, Justice Blackmun indicated that a taking would also occur if a court decision converted private property into public property.⁶¹ He wrote, "Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as 'public money' because it is held temporarily by the court."⁶² *Webb's Fabulous Pharmacies*, therefore, appeared to support a judicial takings doctrine.⁶³

Justice Scalia was the first justice after Justice Stewart to advocate in favor of a judicial takings doctrine. He expressed his views on the topic in his dissent from a denial of certiorari in the case *Stevens v. City of Cannon Beach*.⁶⁴ *Stevens* arose out of the Oregon Supreme Court's famous use of the doctrine of custom in *Thornton v. Hay*.⁶⁵ In *Thornton*, an opinion that has been described as exhibiting "an extraordinary streak of judicial activism,"⁶⁶ the Oregon Supreme Court held that under the doctrine of custom, the entire dry-sand area of the Oregon coastline was open to public recreational use.⁶⁷ When the plaintiffs in *Stevens* were prevented from building a seawall on their beach because it would interfere with the public's access, they appealed to the Supreme Court, claiming their property had been taken without just compensation.⁶⁸

Justice Scalia was clearly uncomfortable with the way the Oregon courts had used the doctrine of custom in *Thornton* and with how they had applied *Thornton* to the *Stevens* case. He affirmed the basic principle that property law is the province of the individual states, but he worried that a state court might manipulate property law in a manner that violated the Constitution.⁶⁹ He did not want his "background principles" discussion in *Lucas v. South Carolina Coastal Council* to become a tool that state courts could use to take property without compensation.⁷⁰ He wrote, "No more by judicial decree than by legislative fiat

⁶⁰ See *Webb's Fabulous Pharmacies*, 449 U.S. at 164 (explaining that "a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court").

⁶¹ See *id.*

⁶² *Id.* (emphasis added).

⁶³ Justice Scalia cited it for this very purpose in *STBR*. See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2602 (2010) (plurality opinion).

⁶⁴ 510 U.S. 1207 (1994) (mem.) (Scalia, J., dissenting from denial of certiorari). Justice O'Connor was the only other justice to join Justice Scalia's dissent.

⁶⁵ 462 P.2d 671 (Or. 1969).

⁶⁶ David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1417 (1996).

⁶⁷ See *Thornton*, 462 P.2d at 676.

⁶⁸ See *Stevens*, 510 U.S. at 1207 (mem.) (Scalia, J., dissenting from denial of certiorari).

⁶⁹ See *id.* at 1210–11.

⁷⁰ See *id.*; see also discussion *supra* note 17.

may a State transform private property into public property without compensation.”⁷¹

Stevens was the last significant instance in which a member of the Court directly addressed the judicial takings issue for approximately sixteen years. The interlude was not due to a lack of available cases. During that time, the Court denied certiorari on the issue fifteen times.⁷² Not until 2010 did the Court finally agree to hear a judicial takings case. Before turning to that case, though, it is instructive to briefly observe how one lower federal court dealt with a judicial takings claim.

IV. A DISTRICT COURT’S APPROACH TO JUDICIAL TAKINGS

In two noteworthy instances, a district court has grappled with the judicial takings issue. In these cases, both decided by the U.S. District Court for the District of Hawaii, the court applied Justice Stewart’s unpredictability test from *Hughes* to find that a judicial taking had occurred. The cases were decided almost identically, so describing the first will suffice to describe both.

*Robinson v. Ariyoshi*⁷³ arose out of a dispute between the State of Hawaii and several private parties over water rights along the Hanapepe River.⁷⁴ The

⁷¹ *Stevens*, 510 U.S. at 1212 (mem.) (Scalia, J., dissenting from denial of certiorari). Justice Scalia also reasoned that,

just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, . . . neither may it do so by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate “background law”—regardless of whether it is really such—could eliminate property rights.

Id. at 1211. Justice Scalia opined that if the Oregon courts’ use of the doctrine of custom was indeed pretextual—as he suspected it was—then the courts had taken the plaintiff’s property in violation of the Fifth Amendment. *See id.* at 1212. Although Justice Scalia thought the “case rais[ed] a serious Fifth Amendment Takings issue,” he believed the factual record was too scanty for the Court to consider the issue. *Id.* at 1212–13. But he thought the Court should hear the petitioner’s due process claim. *Id.* at 1213. He never addressed the question of whether the judicial branch can actually take property in a constitutional sense. Evidently to him the taking was more important than the taker. He would later state this position explicitly in *Stop the Beach Renourishment*. *See infra* text accompanying notes 147–50.

⁷² Petition for Writ of Certiorari at 31, *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot.*, 130 S. Ct. 2592 (2010) (No. 08-1151).

⁷³ 441 F. Supp. 559 (D. Haw. 1977), *aff’d in part and vacated in part*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986). The Ninth Circuit affirmed the parts of the district court’s decision relating to the takings question. *See Robinson v. Ariyoshi*, 753 F.2d 1468, 1475 (9th Cir. 1985). But the U.S. Supreme Court vacated the Ninth Circuit’s opinion and remanded for further consideration in light of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *See Ariyoshi v. Robinson*, 477 U.S. 902 (1986). The Ninth Circuit eventually concluded that the case was not ripe and dismissed the suit. *See Robinson v. Ariyoshi*, 887 F.2d 215, 219 (9th Cir. 1989). For sources discussing the impact of the *Williamson County* exhaustion doctrine on judicial takings claims, see *infra* note 249.

Hawaii Supreme Court, instead of resolving the claims argued on appeal, sua sponte decided that all the water in the river—and indeed all flowing water in the entire state—belonged to the State.⁷⁵ In so doing, according to the district court, the Hawaii Supreme Court overturned more than one hundred years of settled Hawaiian law.⁷⁶ Although it granted the private parties' request for a rehearing, the Hawaii Supreme Court refused to address their constitutional claim.⁷⁷ The private parties then filed suit in the district court, claiming that the Hawaii Supreme Court violated the Fourteenth Amendment by depriving them of property without either procedural or substantive due process.⁷⁸

The district court first addressed the procedural due process claim.⁷⁹ It held that the plaintiffs' procedural due process rights were violated because "the effect of the judgment of the Supreme Court was to deprive the plaintiffs of their property . . . without affording any of them an opportunity to be heard in their defense."⁸⁰

The court also declared that the plaintiffs' substantive due process rights had been violated because the Hawaii Supreme Court's decision took their property without providing compensation.⁸¹ The court applied Justice Stewart's unpredictability test and found that the Hawaii Supreme Court "effected an unforeseeable change in Hawaii's water rights laws."⁸² That the Hawaii Supreme Court did not view its decision as a taking was, according to the district court, irrelevant.⁸³ Because the Hawaii Supreme Court unpredictably changed the state's property law in such a way as to deprive its citizens of their

⁷⁴ *Ariyoshi*, 441 F. Supp. at 561–62.

⁷⁵ *Id.* According to the Hawaii Supreme Court, the state's ownership was subject to appurtenant riparian rights in keeping with English common law. *Id.* Before the court's decision, Hawaii law treated water rights as severable from land appurtenant to the river; owners of land appurtenant to a river could use the water to irrigate more than just the appurtenant property. *Id.* at 581–82.

⁷⁶ *Id.* at 585.

⁷⁷ *Id.* at 564. The court limited the rehearing to two limited, non-constitutional issues. *Id.* The District Court described the rehearing as "almost farcical." *Id.* at 580.

⁷⁸ *Id.* at 580.

⁷⁹ *Id.*

⁸⁰ *Ariyoshi*, 441 F. Supp. at 580 (stating that "[o]n this basis alone the judgment of the court would have to be declared void, for if permitted to remain in full force and effect, plaintiffs have been deprived of property rights without ever having had a fair and meaningful opportunity to defend against their being handed over to the State on a silver platter without even a request by the State for the gift").

⁸¹ *Id.* at 584–86.

⁸² *Id.* at 585 ("[T]he decision made an unsolicited and unexpected gift to the State of all of the waters in all of the streams and to the complete surprise of all parties, said that the State had always owned the waters. There was no precedent for this determination." (emphasis omitted)).

⁸³ *Id.* (stating that "[t]he Constitution does not measure the taking of property by what a court may say or even what it may intend; the measure is by the result").

water rights without compensation, the Fourteenth Amendment required that the court's decision be declared void.⁸⁴

V. *STOP THE BEACH RENOURISHMENT*

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection (STBR)*,⁸⁵ the U.S. Supreme Court heard for the first time a direct judicial takings claim. Six justices agreed that the Constitution limits the ability of state courts to redefine property rights, and the remaining two justices did not necessarily disagree.⁸⁶ Nonetheless, the Court fractured over what constitutional provision it should apply. Four justices agreed that the Takings Clause should apply; two justices indicated they would rather use the Due Process Clause; and the remaining two justices wanted to leave the issue for another day.

A. *Facts of the Case and the State Court Decisions*

In 1995, Hurricane Opal drastically eroded portions of the Florida shoreline along the Gulf of Mexico.⁸⁷ In response, the Florida Department of Environmental Protection (DEP) began a project to renourish the beaches by dredging sand and dumping it along the shoreline.⁸⁸ Stop the Beach Renourishment (STBR), a non-profit corporation comprised of six beachfront property owners, attempted to halt the project.⁸⁹ When it failed to stop the project through an administrative hearing, STBR filed suit in the Florida District Court of Appeal.⁹⁰

STBR challenged the renourishment project as an unconstitutional taking of riparian rights.⁹¹ Under Florida property law, the boundary along the coast between private land (on the landward side) and public land (on the seaward

⁸⁴ *Id.* at 586. The U.S. District Court for the District of Hawaii took a similar approach the next year in *Sotomura v. County of Hawaii*, 460 F. Supp. 473 (D. Haw. 1978). In that case, the plaintiffs challenged a decision of the Hawaii Supreme Court that sua sponte changed the seaward boundary of littoral land from the seaweed line to the vegetation line. *See id.* at 475–76. Unlike *Ariyoshi*, *Sotomura* was not challenged on ripeness grounds or even appealed at all.

⁸⁵ 130 S. Ct. 2592 (2010).

⁸⁶ Justice Stevens recused himself from the case, probably because he owns an apartment near the beach in Fort Lauderdale, Florida. Adam Liptak, *Justices Debate Issues in an Oceanfront Case*, N.Y. TIMES, June 18, 2010, at A15.

⁸⁷ *Save Our Beaches, Inc. v. Fla. Dep't of Env'tl. Prot.*, 27 So. 3d 48, 50 (Fla. Dist. Ct. App. 2006)

⁸⁸ *Id.*

⁸⁹ *Id.* at 51, 55.

⁹⁰ *See id.* at 50–51.

⁹¹ *See id.* at 56. Under Florida law, “[r]iparian rights are property rights that cannot be constitutionally taken without just compensation.” *Id.*

side) is the mean high water line (MHWL).⁹² Because the high water line can shift over time, the seaward boundary of littoral land under Florida common law is a “dynamic boundary” which can increase or decrease the size of a littoral landowner’s property.⁹³ But after a beach restoration project conducted under the Beach and Shore Preservation Act,⁹⁴ the dynamic MHWL boundary is replaced with a fixed boundary, the Erosion Control Line (ECL).⁹⁵ With the ECL as the boundary, a littoral landowner’s property can no longer grow and shrink due to accretion and erosion as it once could under the common law rule.⁹⁶ When the State renourishes the beach by dumping sand along the shoreline, the new beach area belongs to the State.⁹⁷ STBR contended that under Florida law its members’ riparian rights included the right of access to the water (which included the right to have littoral property contact the water) and the right to receive accretions.⁹⁸ By fixing the boundary as the ECL and extending the beach past that line, the renourishment project took those rights without providing compensation. STBR’s arguments prevailed in the Florida District Court of Appeal.⁹⁹

The Florida Supreme Court disagreed.¹⁰⁰ It criticized the lower court for failing to apply the doctrine of avulsion, under which a sudden change to the

⁹² *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1113 (Fla. 2008). “[T]he State holds the lands seaward of the MHWL, including the beaches between the mean high and low water lines, in trust for the public for the purposes of bathing, fishing, and navigation.” *Id.* at 1109. Since the high water line can shift over time due to erosion or accretion, the MHWL is calculated using a nineteen-year average. *Id.* at 1113, 1119.

⁹³ *See id.* at 1112.

⁹⁴ FLA. STAT. §§ 161.011–.45 (2005). Under its constitution, the State of Florida has a duty to “conserve and protect” its shoreline. *Walton Cnty.*, 998 So. 2d at 1110–11 (citing FLA. CONST. art. II, § 7(a)). In accordance with that duty, the state legislature in 1961 enacted the Beach and Shore Preservation Act. *See* FLA. STAT. §§ 161.011–.45. The Act gives the Florida Department of Environmental Protection the responsibility to identify beaches that need restoration and the authority to fund the restoration project. *Id.* § 161.101(1).

⁹⁵ *Id.* § 161.191(1). The Act clarified that

there is no intention on the part of the state to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property. If an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings.

Id. § 161.141.

⁹⁶ *Id.* § 161.191(2).

⁹⁷ *See id.*

⁹⁸ *Save Our Beaches, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 27 So. 3d 48, 57 (Fla Dist. Ct. App. 2006).

⁹⁹ *See id.* at 58.

¹⁰⁰ *See generally* *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008).

shoreline does not alter the seaward boundary of littoral land.¹⁰¹ It also held that there was no possessory right to accretions under Florida law,¹⁰² and that “there [was] no independent littoral right of contact with the water under Florida common law.”¹⁰³ In the opinion of the Florida Supreme Court, therefore, the beach renourishment project did not take any property rights from the members of STBR.

B. *The Parties’ Arguments*

STBR appealed the Florida Supreme Court’s decision to the U.S. Supreme Court, which granted certiorari in 2009.¹⁰⁴ In its brief, STBR changed its strategy from what it had argued before the Florida courts. In the two Florida cases, it had contended that the DEP—part of the executive branch—was attempting to unconstitutionally take its members’ property. Before the Supreme Court it presented an explicit judicial takings argument.¹⁰⁵

¹⁰¹ See *id.* at 1114. Under Florida property law, as under the common law, there is a distinction between “gradual and imperceptible” changes to the shoreline and changes that occur suddenly. See *id.* at 1113. Gradual additions and losses are termed accretions and erosions, respectively. *Id.* Sudden additions and losses are called avulsions. *Id.* Only accretions and erosions change the seaward boundary of littoral land. *Id.* at 1113–14. If the shoreline increases or decreases by avulsion, the boundary remains the same as it was before the avulsion occurred. *Id.* at 1113–14. The Florida Supreme Court explained that Hurricane Opal, which suddenly decreased the size of the beach, was an avulsive event. See *id.* at 1116. The boundary after the hurricane thus remained the MHWL as it was before the hurricane. See *id.* Florida case law establishes the right of littoral landowners to reclaim land that is submerged through an avulsion. See *id.* at 1116–17. “Consequently,” the court concluded, “if the shoreline is lost due to an avulsive event, the public has the right to restore its shoreline up to that MHWL.” *Id.* at 1117. The court’s reasoning seems slightly illogical. Littoral owners can reclaim previously dry land after it has been submerged by an avulsion. But since the state’s land was submerged to begin with, it seems strange that the state should be able to create dry land that it never lost in the first place. STBR argued this very point before the Supreme Court. See Brief of Petitioner at 34, *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592 (2010) (No. 08-1151).

¹⁰² See *Walton Cnty.*, 998 So. 2d at 1116. According to the court, the right to accretions is a contingent future interest. *Id.* at 1112. It “only becomes a possessory interest if and when land is added to the upland by accretion.” *Id.* The right to accretion thus does not apply after the ECL is set as the property boundary. See *id.* at 1117–19.

¹⁰³ *Id.* at 1116. The court interpreted Florida law to mean that the right of “contact is ancillary to the littoral right of access to the water . . . [and] exists to preserve the upland owner’s core littoral right of access to the water.” *Id.* at 1119. Since the Beach and Shore Preservation Act “expressly protects the right of access to the water, which is the sole justification for the subsidiary right of contact,” *id.* at 1119, “the Act, on its face, does not unconstitutionally eliminate the ancillary right to contact,” *id.* at 1120.

¹⁰⁴ See Brief of Petitioner, *supra* note 101, at 2.

¹⁰⁵ See *id.* at 15. In addition to its judicial takings argument, STBR argued a more traditional takings claim: that the Beach and Shore Preservation Act physically took its members’ property. See *id.* at 51–58. It predicted, in a rather far-fetched portion of its argument, that all sorts of commercial activities, including kayak rentals, climbing walls, and

Essentially, STBR advocated that the Supreme Court hold the Florida Supreme Court's decision to be a judicial taking under the unpredictability test espoused by Justice Stewart's concurring opinion in *Hughes*.¹⁰⁶ Quoting Justice Scalia's dissent from the denial of certiorari in *Stevens*, STBR asserted that the Florida Supreme Court "invoked 'nonexistent rules of state substantive law'" when holding that no taking had occurred.¹⁰⁷ It contended that before the Florida Supreme Court's decision, settled Florida law gave its members the right to future accretions and the right to have their property contact the water.¹⁰⁸ The Florida Supreme Court "sidestep[ped] this background law."¹⁰⁹ STBR realized that even if the Supreme Court accepted its argument that the Florida Supreme Court had changed state property law, it could not win unless the Supreme Court recognized a doctrine of judicial takings. Therefore, it dedicated a significant portion of its brief to advocate a doctrine of judicial takings and promote Justice Stewart's unpredictability test in *Hughes*.¹¹⁰

In its reply brief, the DEP asserted that even if the Supreme Court decided to adopt a judicial takings doctrine, it should not find such a taking in the case at hand.¹¹¹ The DEP contended that if the Supreme Court chose to adopt a judicial takings doctrine, that doctrine should be extremely narrow.¹¹² According to the DEP, to find a judicial taking, the reviewing court must find the lower court decision to be much more than merely unpredictable. The lower court must have "abused [its] judicial authority" in "an egregious way."¹¹³ Its decision must have been "plainly a wholly unprincipled and pretextual departure from obvious and well-established legal principles" before a judicial taking could

parasailing, would occur on the public portion of the renourished beach. *See id.* at 55. It also argued that its procedural due process rights had been violated because the beach renourishment process did not afford it a "meaningful opportunity to be heard." *See id.* at 60, 59-66.

¹⁰⁶ *See id.* at 20. ("STBR respectfully requests that this Court expressly recognize the doctrine of judicial takings and adopt the judicial takings test articulated by Justice Stewart in his concurring opinion in *Hughes*." (citation omitted)).

¹⁰⁷ *Id.* at 21-22 (quoting *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1207 (1992) (mem.) (Scalia, J., dissenting from denial of certiorari)).

¹⁰⁸ *Id.* at 22-23.

¹⁰⁹ *Id.* at 26.

¹¹⁰ *See* Brief of Petitioner, *supra* note 101, at 34-50. In STBR's own words: "[T]his Court [should] hold that a state court decision which suddenly and dramatically changes what constitutes property under state property law, in a manner that is unpredictable in terms of relevant precedents, is a taking of property subject to the Fifth Amendment's compensation requirements." *Id.* at 50.

¹¹¹ *See* Brief of Respondents at 37-38, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151).

¹¹² *See id.* at 38.

¹¹³ *Id.* at 58.

occur.¹¹⁴ According to the DEP, the Florida Supreme Court's ruling in *STBR* was not such a decision.¹¹⁵

C. The Supreme Court's Decision

The Supreme Court unanimously held for the DEP,¹¹⁶ determining that the Florida Supreme Court had not taken any property from the members of *STBR*.¹¹⁷ But although the Court's holding was unanimous, its reasoning was not. The plurality opinion, authored by Justice Scalia and joined by three other justices, sought to establish a judicial takings doctrine based upon a test asking whether established property rights had been taken.¹¹⁸ Justice Kennedy, joined by Justice Sotomayor, thought that the Court should employ the Due Process Clause to protect against judicial takings.¹¹⁹ Justice Breyer, joined by Justice Ginsburg, thought that the Court should save the issue of a judicial takings doctrine for a later case.¹²⁰

1. The Court's Holding

The Court's unanimous holding, authored by Justice Scalia, concluded that no taking had occurred.¹²¹ As the Court framed the issue, to prevail *STBR* needed to show that its "rights to future accretions and contact with the water [were] superior to the State's right to fill in its submerged land."¹²² The Court first observed that in the case of an avulsion that increases the size of the beach, the State owns the newly exposed section of the beach.¹²³ So, queried the Court, should that result change if the State caused the avulsion (e.g., by dumping sand along the shoreline)?¹²⁴ As the Court interpreted Florida law, the answer was "no," and therefore the State's right to fill was superior to the littoral right to

¹¹⁴ *Id.*

¹¹⁵ *Id.* Far from effecting a sudden and unpredictable change in Florida property law, argued the DEP, the Florida Supreme Court "merely validat[ed] an established statutory framework by use of reasoning and analysis that [was] fully supportable." *Id.* at 38. The Department cautioned against implementing a judicial takings doctrine that would require federal courts to meddle in state property law. *See id.* at 58 (warning that "[f]ederal courts should not involve themselves in and second-guess the evolution of state common law, which can vary widely from state to state").

¹¹⁶ Eight justices joined the holding. Justice Stevens did not participate in the decision. *Stop the Beach Renourishment*, 130 S. Ct. at 2597.

¹¹⁷ *See id.* at 2613.

¹¹⁸ *See id.* at 2602 (plurality opinion).

¹¹⁹ *See id.* at 2614 (Kennedy, J., concurring in part and concurring in the judgment).

¹²⁰ *See id.* at 2619 (Breyer, J., concurring in part and concurring in the judgment).

¹²¹ *See id.* at 2597, 2613 (majority opinion). The Court's unanimous holding is contained in Parts I, IV, and V of his opinion.

¹²² *Stop the Beach Renourishment*, 130 S. Ct. at 2611.

¹²³ *See id.*

¹²⁴ *See id.*

accretion.¹²⁵ The Court recognized that a legal scheme which allows a state to create public beaches simply by dumping sand along private beaches might not be ideal from a public policy standpoint.¹²⁶ Nonetheless, “[t]he Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established.”¹²⁷ Finally, the Court addressed STBR’s professed right to have its land contact the water.¹²⁸ It concluded that the Florida Supreme Court’s analysis of that supposed right was correct in light of prior Florida precedent.¹²⁹

Because the Supreme Court determined that Florida’s right to renourish its beaches was superior to STBR’s littoral property rights, it affirmed the decision of the Florida Supreme Court.¹³⁰ The Court concluded that the Florida Supreme Court’s decision had not taken any property rights from STBR.¹³¹

2. Justice Breyer’s Opinion

Justices Breyer, joined by Justice Ginsburg, agreed that no property rights had been taken and would have ended the analysis at that.¹³² He worried that Justice Scalia’s attempt to articulate a test for judicial takings would open a Pandora’s box of takings issues that was better off left shut.¹³³ Specifically, he worried that thousands of judicial takings cases, many involving difficult areas of state property law, would flood the Court.¹³⁴ He also wished to avoid the possibility of federal judges meddling in the evolution of state property law.¹³⁵ Since there was no taking by the Florida Supreme Court, Justice Breyer thought the Court should “‘confine [itself] to deciding only what is necessary to the disposition of the immediate case.’”¹³⁶

¹²⁵ See *id.*

¹²⁶ See *id.* at 2612.

¹²⁷ *Id.*

¹²⁸ See *Stop the Beach Renourishment*, 130 S. Ct. at 2612.

¹²⁹ See *id.* at 2612–13 (finding that “[t]he Florida Supreme Court decision before us is consistent with these background principles of state property law”).

¹³⁰ See *id.* at 2613.

¹³¹ See *id.* at 2612 (holding that “[w]e cannot say that the Florida Supreme Court’s decision eliminated a right of accretion established under Florida law”).

¹³² See *id.* at 2618 (Breyer, J., concurring in part and concurring in the judgment).

¹³³ See *id.* at 2618–19.

¹³⁴ See *Stop the Beach Renourishment*, 130 S. Ct. at 2619 (Breyer, J., concurring in part and concurring in the judgment); cf. Thompson, *supra* note 24, at 1512 (arguing that “[t]he sheer financial burden of petitioning the Supreme Court is likely to provide a significant incentive against bringing a large number of groundless challenges” and that “[c]oncern over workload, moreover, need not call for the disavowal of a judicial takings doctrine, but merely the enunciation of relatively clear and high standards for prevailing on a judicial takings claim”).

¹³⁵ See *Stop the Beach Renourishment*, 130 S. Ct. at 2619 (Breyer, J., concurring in part and concurring in the judgment).

¹³⁶ *Id.* (quoting *Whitehouse v. Ill. Cent. R.R. Co.*, 349 U.S. 366, 373 (1955)). He observed that “courts frequently find it possible to resolve cases—even those raising

3. Justice Kennedy's Opinion

To a certain extent, Justice Kennedy's opinion—which Justice Sotomayor joined—reached the same conclusion as Justice Breyer's. That is, Justice Kennedy believed that the Court should go no further than to decide that no property rights had been taken, saving the judicial takings issue for another day.¹³⁷ Justice Kennedy's self-professed reason for writing his separate opinion was to “note[] certain difficulties that should be considered” before the Court adopted Justice Scalia's judicial takings test.¹³⁸ But the most salient part of his opinion is his argument that reviewing courts should use the Due Process Clause, not the Takings Clause, to prevent lower courts from taking private property.¹³⁹

Justice Kennedy suggested that the Court could use the Due Process Clause to “limit[] the power of courts to eliminate or change established property rights.”¹⁴⁰ He proposed that a judicial decision that takes property “be set aside as a deprivation of property without due process of law.”¹⁴¹ Both the procedural and substantive aspects of the Due Process Clause could apply to a judicial taking.¹⁴² In Justice Kennedy's words: “The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is

constitutional questions—without specifying the precise standard under which a party wins or loses.” *Id.*; see also Barros, *supra* note 18, at 915 (arguing that “Justices Breyer and Kennedy have the better of this argument”).

¹³⁷ See *Stop the Beach Renourishment*, 130 S. Ct. at 2617–18 (Kennedy, J., concurring in part and concurring in the judgment).

¹³⁸ See *id.* at 2613. Kennedy identified four principal difficulties with adopting a judicial takings doctrine. First, Kennedy believed that a judicial takings doctrine would “implicitly recognize” state courts' power to take property as long as compensation is provided, a power that he was not sure they possessed. See *id.* at 2614. He worried that a judicial takings doctrine would give more, not less, takings power to state courts. See *id.* at 2616. Second, Kennedy considered the method by which judicial takings claims should be raised to be unclear. See *id.* If a state supreme court changes property law, should the property owner petition the U.S. Supreme Court for a writ of certiorari (in which case the takings issue would not have been considered in the court below), or should the property owner bring a separate lawsuit to argue the judicial takings claim? See *id.* at 2617. Third, Kennedy thought that applying the Takings Clause to judicial actions might be inconsistent with the Framers' intent. See *id.* at 2616. Fourth, Kennedy wondered what relief should be provided for a judicial taking. See *id.* at 2617. Should it be compensation or equitable relief? See *id.* Because of these unresolved issues, Kennedy thought the Court should postpone adopting a judicial takings doctrine until lower courts and commentators had fleshed out the details. See *id.* at 2617–18.

¹³⁹ See *id.* at 2614.

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

¹⁴² *Id.*

‘arbitrary or irrational’ under the Due Process Clause.”¹⁴³ Using the Due Process Clause rather than the Takings Clause would solve the difficult question of whether compensation or invalidation should be the proper remedy for a judicial taking.¹⁴⁴

On the whole, Justice Kennedy’s opinion indicates that he was critical of applying the Takings Clause to the judicial branch and preferred to apply the procedural and substantive aspects of due process. But Justice Kennedy was not completely averse to applying the Takings Clause. He conceded that “[i]f and when future cases show that the usual principles, including constitutional principles that constrain the judiciary like due process, are somehow inadequate to protect property owners, then the question whether a judicial decision can effect a taking would be properly presented.”¹⁴⁵ Clearly, though, Justice Kennedy viewed that time as far in the future.

4. Justice Scalia’s Opinion

Not surprisingly, given his dissent from the denial of certiorari in *Stevens*, Justice Scalia wholeheartedly supported applying the Takings Clause to the judicial branch. In his plurality opinion, joined by Chief Justice John Roberts and Justices Alito and Thomas,¹⁴⁶ Justice Scalia outlined the approach he thought the Court should take.

Justice Scalia found support for a judicial takings doctrine in the text of the Fifth Amendment. He thought it significant that the Takings Clause is written in the passive voice.¹⁴⁷ Because the Takings Clause “is not addressed to the action of a specific branch or branches,” “[i]t is concerned simply with the act, and not with the governmental actor.”¹⁴⁸ According to its text, then, the Takings Clause applies to any governmental taking of private property, whether accomplished by the legislative, executive, or judicial branch.¹⁴⁹ “It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.”¹⁵⁰

The second area in which Justice Scalia found support for a judicial takings doctrine was Supreme Court precedent. He observed that *Pruneyard*,¹⁵¹ although it did not address the judicial takings issue, never implied that judicial

¹⁴³ *Stop the Beach Renourishment*, 130 S. Ct. at 2615 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005)).

¹⁴⁴ *See id.* at 2614.

¹⁴⁵ *See id.* at 2618.

¹⁴⁶ *See id.* at 2601–10 (plurality opinion).

¹⁴⁷ *See id.* at 2601. The Takings Clause reads: “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

¹⁴⁸ *Stop the Beach Renourishment*, 130 S. Ct. at 2601 (plurality opinion).

¹⁴⁹ *See id.*

¹⁵⁰ *Id.*

¹⁵¹ For a discussion of *Pruneyard*, see *supra* text accompanying notes 48–53.

takings cannot occur and might be read as implying the opposite.¹⁵² He also cited *Webb's Fabulous Pharmacies*¹⁵³ as supporting a judicial takings doctrine.¹⁵⁴

Once he had shown that a judicial takings doctrine was grounded both in the text of the Constitution and in Supreme Court precedent, Justice Scalia articulated the test that he thought the Court should employ. He rejected both the test proposed by the DEP and the test proposed by STBR.¹⁵⁵ He interpreted the DEP's proposed test as similar to the "fair and substantial basis" test used by the Court when determining whether a state court opinion is supported by adequate and independent state grounds.¹⁵⁶ That test, wrote Justice Scalia, "is not obviously appropriate for determining whether there has been a taking of property."¹⁵⁷

Justice Scalia also found the unpredictability test, first proposed by Justice Stewart and backed by STBR, to be deficient. He argued that Stewart's unpredictability test was both too broad and too narrow.

A "predictability of change" test would cover both too much and too little. Too much, because a judicial property decision need not be predictable, so long as it does not declare that what had been private property under established law no longer is. . . . And the predictability test covers too little, because a judicial elimination of established private-property rights that is foreshadowed by dicta or even by holdings years in advance is nonetheless a taking.¹⁵⁸

Instead, Justice Scalia proposed a new approach. "If . . . a court declares that what was once an established right of private property no longer exists, it has taken that property"¹⁵⁹ Of course, that test begs the question of when a property right can be considered "established." To determine whether a property right is established, said Justice Scalia, the Court should look to state law.¹⁶⁰ A property right is established only if there is no doubt about its existence.¹⁶¹ If the existence of a property right is doubtful, the Court should "not make [its] own assessment but [rather] accept the determination of the state court."¹⁶²

¹⁵² See *Stop the Beach Renourishment*, 130 S. Ct. at 2601–02 (plurality opinion).

¹⁵³ For a discussion of *Webb's Fabulous Pharmacies*, see *supra* text accompanying notes 54–63.

¹⁵⁴ See *Stop the Beach Renourishment*, 130 S. Ct. at 2602 (plurality opinion).

¹⁵⁵ See *id.* at 2608–10.

¹⁵⁶ See *id.* at 2608.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 2610.

¹⁵⁹ *Id.* at 2602 (emphasis omitted); see also John D. Echeverria, *Stop the Beach Renourishment: Why the Judiciary Is Different*, 35 VT. L. REV. 475, 477 (2010) (describing Justice Scalia's test as a "per se takings test" analogous to physical invasions and regulations that deprive the property owner of all economically beneficial uses of the property).

¹⁶⁰ See *Stop the Beach Renourishment*, 130 S. Ct. at 2608 n.9 (plurality opinion).

¹⁶¹ See *id.*

¹⁶² *Id.*

Under Justice Scalia's test, then, a court must evaluate the challenged court decision in light of state property law. If under state law a private property right was "established" and if the decision eliminated that property right, the decision accomplished a taking.

Along with his test, Justice Scalia proposed how the Court should remedy a judicial taking. According to Justice Scalia, if the Court finds that a judicial taking occurred, it should invalidate the state court decision that accomplished the taking.¹⁶³ Rather than require the state court to provide compensation, the Court should invalidate the decision, thus requiring the legislature to acquire the property by eminent domain if it should choose to do so.¹⁶⁴

Justice Scalia energetically criticized the concurring opinions written by Justices Breyer and Kennedy. He attacked Justice Breyer's opinion as illogical.¹⁶⁵ "One cannot know whether a takings claim is invalid without knowing what standard it has failed to meet."¹⁶⁶

He criticized Justice Kennedy's proposed use of the Due Process Clause on multiple grounds.¹⁶⁷ Essentially, he was suspicious of applying what he viewed as an extremely amorphous doctrine.¹⁶⁸ "[B]ecause Substantive Due Process is such a wonderfully malleable concept, . . . even a firm commitment to apply it would be a firm commitment to nothing in particular."¹⁶⁹ In Justice Scalia's

¹⁶³ See *id.* at 2607 ("If we were to hold that the Florida Supreme Court had effected an uncompensated taking in the present case, we would simply reverse the Florida Supreme Court's judgment that the Beach and Shore Preservation Act can be applied to the property in question.").

¹⁶⁴ See *id.*

¹⁶⁵ See *id.* at 2603.

¹⁶⁶ See *Stop the Beach Renourishment*, 130 S. Ct. at 2603 (plurality opinion). Employing what must be one of the more unusual phrases found in a Supreme Court opinion, Justice Scalia described Breyer's opinion as "reminiscent of the perplexing question how much wood would a woodchuck chuck if a woodchuck could chuck wood?" *Id.* Professor Barros contends that in this argument Justice Breyer had the stronger position. See Barros, *supra* note 18, at 916 (concluding that since no property was taken, "[u]nder no conceivable standard . . . could the Florida Supreme Court's holding be a judicial taking, and the Supreme Court of the United States . . . did not need to reach the specific substantive standard for judicial takings to reject the petitioner's claims").

¹⁶⁷ First, Justice Scalia contended that procedural due process should not apply to prevent state courts from taking property since federal separation-of-powers principles do not apply to state governments. See *Stop the Beach Renourishment*, 130 S. Ct. at 2605 (plurality opinion). Second, he condemned the use of substantive due process rather than the Takings Clause as violating the Court's practice of whenever possible applying an explicit constitutional provision rather than the vague standard of substantive due process. See *id.* at 2606. He ridiculed Justice Kennedy's proposed application of substantive due process to property issues as an attempt to take the Court back to the *Lochner* Era. See *id.* To Justice Kennedy's original intent concern, Justice Scalia replied that the clear text of the Takings Clause makes the authors' intent irrelevant. See *id.* Finally, Justice Scalia dismissed Justice Kennedy's concern that the remedy for a judicial taking must be compensation. See *id.* at 2607. In his view, invalidation, not compensation, was the appropriate remedy. See *id.*

¹⁶⁸ See *id.* at 2608.

¹⁶⁹ *Id.*

opinion, the Takings Clause provided a more secure bastion for guarding against judicial takings.

5. *STBR's Impact on the Judicial Takings Concept*

To recap, in *STBR* at least six justices¹⁷⁰ agreed that the ability of state courts to take private property by redefining the law must be limited. Two more justices¹⁷¹ thought the issue should be saved for another day, but they did not explicitly disagree on principle. Therefore, the Court apparently no longer adheres to its position in cases such as *Tidal Oil*, *Brinkerhoff-Faris*, and *Great Northern Railway*, which declared that state courts were free to alter property law as they pleased without violating any constitutional rights.¹⁷²

What the Court did not agree on was the standard under which judicial takings claims should be analyzed. Four justices agreed that the Takings Clause should apply so that a court takes property when it “declares that what was once an established right of private property no longer exists.”¹⁷³ Two justices suggested that the Due Process Clause, in both its substantive and procedural aspects, should apply when a state court redefines property law.¹⁷⁴ Under this approach, “a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is ‘arbitrary or irrational’ under the Due Process Clause.”¹⁷⁵

The Court also split over the remedy a court should employ when it finds that a state court decision has taken property. If a court finds that the challenged court decision violates due process, the remedy seems clear. The decision should be invalidated.¹⁷⁶ Justice Scalia thought that invalidation should also be the remedy if a court finds that the challenged court decision violates the Takings Clause.¹⁷⁷ But Justice Kennedy argued that the correct remedy under the Takings Clause is to order the lower court to provide compensation.¹⁷⁸

VI. FIVE SCHOLARS AND THEIR SUGGESTED JUDICIAL TAKINGS TESTS

The scholarly literature addressing the judicial takings issue is somewhat limited,¹⁷⁹ although it has expanded since *STBR*. Several scholars, some writing

¹⁷⁰ Chief Justice Roberts and Justices Scalia, Alito, Thomas, Kennedy, and Sotomayor.

¹⁷¹ Justices Breyer and Ginsburg.

¹⁷² See *supra* Part III.B.

¹⁷³ See *Stop the Beach Renourishment*, 130 S. Ct. at 2602 (plurality opinion).

¹⁷⁴ See *id.* at 2614 (Kennedy, J., concurring in part and concurring in the judgment).

¹⁷⁵ *Id.* at 2615 (citations omitted).

¹⁷⁶ See *id.* at 2614.

¹⁷⁷ See *id.* at 2607 (plurality opinion).

¹⁷⁸ See *id.* at 2614 (Kennedy, J., concurring in part and concurring in the judgment).

¹⁷⁹ See W. David Sarratt, *Judicial Takings and the Course Pursued*, 90 VA. L. REV. 1487, 1494 (2004) (observing that “[s]cholars . . . have given this question, most commonly called the ‘judicial takings problem,’ sporadic attention”).

before *STBR* and some writing after, have proposed their own versions of tests they think courts should apply when deciding a judicial takings claim. Five authors in particular—Barton Thompson, David Sarratt, Benjamin Barros, and co-authors Eduardo Peñalver and Lior Strahilevitz—have formulated judicial takings tests and suggested remedies that courts should invoke when they find a judicial taking.

A. Barton Thompson's Approach: Stewart's Unpredictability Test and Two Innovative Remedies

Professor Barton Thompson's article, *Judicial Takings*,¹⁸⁰ is widely recognized as the groundbreaking article on judicial takings.¹⁸¹ His central thesis was that the takings protections of the Constitution should apply to the judicial branch as well as to the legislative and executive branches.¹⁸² In keeping with his thesis, he first assumed that a judicial taking occurs when a court changes the law in a way that would constitute a taking if done by a legislature or an executive agency.¹⁸³ But he recognized that under the positivist definition of property rights embraced by the Supreme Court, property rights are whatever a court says they are.¹⁸⁴ Under a positivist definition of property rights, it really cannot ever be said that a court has changed the law in such a way as to take property.¹⁸⁵

Thompson's solution was to suggest that although the Court says it employs a positivist definition of property law, in reality it has adopted an expectations approach to property law.¹⁸⁶ Under an expectations approach, a judicial taking occurs when a court *suddenly* changes the law in such a way that it would constitute a taking if done by a legislature or an executive agency.¹⁸⁷

In short, to the extent he advocated a test for judicial takings, Thompson essentially espoused the same unpredictability test as that proposed by Justice Stewart.¹⁸⁸ Additionally, he suggested that a reviewing federal court should

¹⁸⁰ Thompson, *supra* note 24.

¹⁸¹ See Sarratt, *supra* note 179, at 1494 (describing Thompson's article as "seminal").

¹⁸² See Thompson, *supra* note 24, at 1542 ("In the Introduction, the question was whether the courts should be treated any differently under the takings protections than the legislative and executive branches of our governments. An alternative question could have been whether the legislative and executive branches should be treated any differently from the courts.").

¹⁸³ See *id.* at 1455.

¹⁸⁴ See *id.* at 1523.

¹⁸⁵ See *id.* ("Given the indeterminacy of positive law, . . . will we ever be able to say definitively that a court has changed the law?").

¹⁸⁶ See *id.* at 1539 ("[T]here is language in at least some cases suggesting that the Court is not using a pure positivist approach even in traditional takings cases, but is instead using an expectations approach.").

¹⁸⁷ See *id.* at 1496–97.

¹⁸⁸ See Mulvaney, *supra* note 44, at 253–55 (recognizing that "Thompson may not have perfectly accomplished his stated goal of formulating a 'relatively clear and high standard[']

inquire “whether the state judicial decision was neutral and fully considered its impact on property holders.”¹⁸⁹ In the context of that inquiry, he posited that “[w]here a change seems to be a natural step in a slow but continuous evolution in the common law, one feels relatively assured that the change was not motivated by current political pressures and has been carefully considered.”¹⁹⁰

Thompson’s test suffers from the same ambiguity that impairs Justice Stewart’s test.¹⁹¹ It fails to make clear whether a judicial takings claim should be analyzed under the Due Process Clause or the Takings Clause. Additionally, as Justice Scalia pointed out in *STBR*, a foreseeable change in the law can take property just as surely as can a nonforeseeable change. The predictability of the change may ensure that the court decision comports with substantive due process considerations, but it does not necessarily determine whether a taking has occurred. Furthermore, one suspects that a property owner who lost a property right as a result of a “neutral and fully considered” court decision would find little solace in the Court’s impeccable reasoning.

Thompson’s discussion of remedies was much more innovative than his discussion of a judicial takings test. He recognized that one option is to assume that the Takings Clause prohibits courts from taking property.¹⁹² Under that assumption, a court decision that takes property would be declared invalid by the reviewing court. Another approach, though, is to assume that a court decision can take property so long as the state provides just compensation. Thompson suggested two remedies a reviewing court could employ when it finds that a lower court decision effected a taking.¹⁹³ First, under the Automatic Compensation Approach, the reviewing court could require the lower court to vacate its decision unless the state provided compensation for the taking.¹⁹⁴ Second, under the Legislative Choice Approach, the reviewing court could declare the lower court decision unconstitutional unless the state legislature provided compensation within a certain timeframe set by the reviewing court.¹⁹⁵ Under either approach, the change in the law would be upheld so long as property owners received compensation.

The advantage of Thompson’s remedies is that they allow the state to make the final decision regarding whether to change its property law. Federalism concerns are one of the main objections raised by opponents of a judicial takings doctrine, who argue that such a doctrine would impair the ability of

for prevailing on a judicial takings claim” (alteration in original) (quoting Thompson, *supra* note 24, at 1512)).

¹⁸⁹ Thompson, *supra* note 24, at 1496.

¹⁹⁰ *Id.* at 1497.

¹⁹¹ See *supra* notes 43–44 and accompanying text.

¹⁹² See Thompson, *supra* note 24, at 1513.

¹⁹³ See *id.*

¹⁹⁴ See *id.* at 1522.

¹⁹⁵ See *id.*

state courts to evolve state property law.¹⁹⁶ Thompson's two suggested remedies largely allay these concerns because they allow state courts to change property law so long as the state complies with the Fifth Amendment requirement of just compensation.

B. David Sarratt's Approach: The "Law-Making" vs. "Law-Finding" Test

David Sarratt proposed an innovative approach to judicial takings that equated state judicial decisions with state legislative decisions. He claimed that in *Erie Railroad Co. v. Tompkins*¹⁹⁷ the Supreme Court ruled that absent a contrary indication from a state, federal courts must treat state judge-made law as equivalent to state statutory law.¹⁹⁸ Drawing upon that principle, he argued that "*Erie* imposes the obligation to treat state law created by the judiciary as real state law, which is in turn capable of effecting a taking."¹⁹⁹

After finding the foundation for a judicial takings doctrine in the *Erie* Doctrine, Sarratt suggested a judicial takings approach. The key inquiry that a reviewing court should make is "whether the state court was wearing its lawmaking hat or its law-finding hat."²⁰⁰ To answer this question the court should use Justice Stewart's unpredictability test.²⁰¹ Essentially, then, Sarratt proposed an unpredictability test. If the lower court decision effects a sudden and unpredictable change in state property law, the court is making law and taking property.²⁰² On the other hand, if the lower court decision is reasonably predictable, the court is finding law, and no taking has occurred.²⁰³

Sarratt's approach suffers from the same disability that afflicts Justice Stewart and Professor Thompson's similar approaches. As Justice Scalia

¹⁹⁶ See *id.* at 1509 (observing that "the most frequently heard objection [to a judicial takings doctrine] is that the development and specification of property law is a matter for the state courts, and that federal courts should not interfere with this process through assertion of the takings protections").

¹⁹⁷ 304 U.S. 64 (1938).

¹⁹⁸ Sarratt, *supra* note 179, at 1527 (stating that "[t]he constitutional rule of *Erie* . . . is simply that the national government must respect a state's right to choose the voice through which it articulates its law").

¹⁹⁹ *Id.* at 1528. Sarratt further stated that "*Erie* recognized that state judges should be presumed not only to be authoritative law-finders but also lawmakers, empowered to announce the will of the state—to willfully change the law. It follows, however, that the will of the state is subject to the takings protections." *Id.* at 1529.

²⁰⁰ *Id.* at 1530.

²⁰¹ *Id.*

²⁰² See *id.*

²⁰³ *Id.* Sarratt tied in his test to the Court's discussion of "background principles" in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). See Sarratt, *supra* note 179, at 1530–31. If the lower court's holding is consistent with "background principles" of state law, the court is finding law and is not effecting a taking. See *id.* at 1533.

pointed out, the predictability of a court's decision has little bearing on whether the decision has taken property.²⁰⁴

C. Benjamin Barros's Approach: Distinguish Between Private-Public Transfers and Private-Private Transfers

Professor Benjamin Barros proposed yet a third approach to determining whether a judicial taking has occurred.²⁰⁵ He viewed formulating a special test for judicial takings as unnecessary.²⁰⁶ Rather, he suggested that “[a] judicial action should be considered a taking under the Just Compensation Clause if the equivalent action would be a taking if performed by the legislature or the executive.”²⁰⁷ Since the Takings Clause is not directed to a specific branch of government but applies equally to the legislature, the executive, and the judiciary, the same approach should apply to all three.²⁰⁸

Furthermore, Barros contended that the Takings Clause should apply only to situations in which a court has taken private property and turned it into public property—a “private-public transfer.”²⁰⁹ It should not apply when a court has taken property from one private party and transferred it to another—a “private-private transfer.”²¹⁰ For example, if a court changed the law so as to move the seaward boundary of private beachfront property inward, what was previously private property would become public property, and the Takings Clause would apply.²¹¹ But if a court changed the law so as to destroy a previously existing easement, the property interest would shift from one private person (the owner of the dominant estate) to another private person (the owner of the servient estate), and the Takings Clause would not apply.²¹²

Barros supported this distinction with four arguments. First, he contended that the word “taken” in the Fifth Amendment applies more naturally to private-public transfers than to private-private transfers.²¹³ Although he conceded that a private-private transfer “deprives” the private party of its property, he argued that only a private-public transfer “takes” property.²¹⁴ Second, he pointed out

²⁰⁴ See *supra* text accompanying note 158.

²⁰⁵ See Barros, *supra* note 18, at 917.

²⁰⁶ See *id.*

²⁰⁷ See *id.*

²⁰⁸ See *id.* at 919 (“The branches of government are equivalent in [the Takings Clause] context, and there is no need to create a unique standard for judicial takings.”).

²⁰⁹ See *id.*

²¹⁰ See *id.*

²¹¹ See Barros, *supra* note 18, at 920.

²¹² See *id.*

²¹³ *Id.* at 921. Barros argues that “[i]t is natural to read the word ‘taken’ in the Just Compensation Clause as applying to those circumstances where the government action transfers the property interest from a private person to the government.” *Id.* at 921. “In a private-private transfer, in contrast, the government action does not take property in the same way.” *Id.*

²¹⁴ *Id.* at 922.

that few of the Court's regulatory takings cases support applying the Takings Clause to a private-private transfer.²¹⁵ Third, he argued that Justice Scalia's plurality opinion in *STBR* does not support applying the Takings Clause to a private-private transfer.²¹⁶ Fourth, limiting the judicial takings doctrine to private-public takings would in large part avoid the potential of myriads of judicial takings claims inundating the federal courts' dockets.²¹⁷ If the judicial takings doctrine were cabined to exclude private-private transfers, federal courts would likely avoid a potential deluge of litigation.

One additional argument supports Barros's position. The Supreme Court has repeatedly stated that the primary reason for the Takings Clause is to prevent "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."²¹⁸ If a court decision transfers property from one party to another, fairness does not seem to require that the public bear the cost of that transfer. Thus, the policy underlying the Takings Clause would not require the reviewing court to apply a judicial takings analysis to a private-private transfer.

In Barros's opinion, courts should analyze private-private transfers under the Due Process Clause.²¹⁹ He suggested that "private-private transactions may 'deprive' owners of property interests within the meaning of the Due Process Clause even if they do not 'take' those interests within the meaning of the Just Compensation Clause."²²⁰ He appeared to agree with Justice Kennedy that judicial decisions that "eliminate[] or *substantially change*[] established property rights" violate substantive due process.²²¹ Barros's approach here

²¹⁵ See *id.* at 922–26.

²¹⁶ *Id.* at 930; cf. Mulvaney, *supra* note 44, at 263 (concluding that "to the extent that the plurality's broad vision of a judicial takings doctrine is based on treatment of the branches as equivalent, the plurality's standard may well be applicable to new rules announced in adjudications of disputes between private parties"). Barros's argument on this point is slightly less than compelling. Justice Scalia stated that "though the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing." *Stop the Beach Renourishment v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2601 (2010) (plurality opinion) (emphasis added). Barros contends that when read in context Justice Scalia's statement does not actually support applying the judicial takings doctrine to private-private transfers. See Barros, *supra* note 18, at 930–31. Perhaps a better argument would be that in *STBR*, Justice Scalia was dealing with a case involving an alleged private-public transfer only. He most likely did not consider the effect his broad language would have upon a private-private transfer.

²¹⁷ See Barros, *supra* note 18, at 958–59.

²¹⁸ See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

²¹⁹ Barros, *supra* note 18, at 940 (concluding that "[s]ubstantive due process therefore should offer the only avenue for review of the substance of a government act that results in a private-private transfer").

²²⁰ *Id.* at 938.

²²¹ See *id.* (quoting *Stop the Beach Renourishment*, 130 S. Ct. at 2615 (Kennedy, J., concurring in part and concurring in the judgment)).

seems sound since the Supreme Court has held that a private-private transfer violates due process.²²²

Barros contemplated that a court might have to engage in a due process inquiry and a takings inquiry in the same case. As seen in Part VII, this Note extends that thought by arguing that courts *should* engage in both inquiries in most judicial takings cases.

Finally, Barros argued that the proper remedy for a judicial taking should be to invalidate the court decision that accomplished the taking.²²³ Similarly, he concluded that invalidation is also the proper remedy for a court decision that violates due process.²²⁴

D. Eduardo M. Peñalver and Lior Strahilevitz's Approach: Distinguish Between Intentional Takings and Unintentional Deprivations of Property

In an insightful, recent article, Professors Peñalver and Strahilevitz attempt to "delineate the boundaries between a judicial taking and a violation of the Constitution's due process protections."²²⁵ The boundary, they suggest, should be marked by the court's intent.²²⁶ The Takings Clause is implicated "[w]here a judicial decision intentionally seizes private property in order to achieve a legitimate public end."²²⁷ But "where the judiciary does not intend to appropriate private owner's property, as well as when the diminution of private property rights results from a judicial action that serves no legitimate public purpose," the Due Process Clause of the Fifth Amendment is the appropriate constitutional provision to apply.²²⁸ To support this intent-based distinction, Peñalver and Strahilevitz focus on the word "for" in the Takings Clause.²²⁹ ("[N]or shall private property be taken *for* public use without just

²²² See *Mo. Pac. Ry. v. Nebraska*, 164 U.S. 403, 417 (1896) (stating that "[t]he taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States"); see also Mulvaney, *supra* note 44, at 252 (predicting that "the Takings Clause might require compensation—depending on the severity of the burden on private property rights and the distribution of that burden—only 'in the event of otherwise proper interference,' that is, in the event that the governmental act is related to a 'public use'" (quoting *Lingle*, 544 U.S. at 543)).

²²³ See Barros, *supra* note 18, at 955 (concluding that "Justice Scalia had the better argument on this issue").

²²⁴ See *id.* at 954 (noting that "inverse condemnation . . . should not be available for cases seeking redress for deprivations of property in violation of substantive or procedural due process").

²²⁵ Eduardo M. Peñalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process?*, 97 CORNELL L. REV. 305, 306 (2012).

²²⁶ See *id.* at 312.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 321.

compensation.”²³⁰) They contend that “for” indicates a requirement of intentionality that defines the boundary of the Takings Clause’s applicability.²³¹ They also point to cases falling within the regulatory takings context that differentiate between intentional takings, to which courts apply the Takings Clause, and unintentional deprivations of property, which are treated as government torts.²³²

As far as remedies are concerned, Peñalver and Strahilevitz conclude that Justice Kennedy had the better position in *STBR*.²³³ A violation of the Takings Clause is remedied by forcing the state to provide just compensation; a due process violation, on the other hand, requires invalidation.²³⁴

By attempting to delineate the boundary between the Takings Clause and due process considerations in the context of judicial takings, Peñalver and Strahilevitz continue the debate that Justices Scalia and Kennedy started in *STBR*. But it is unclear why courts need to choose between the Due Process Clause and the Takings Clause when evaluating a judicial takings claim. Instead, as explained immediately below in Part VII, courts should apply both provisions. Furthermore, whether or not a court intended to take property seems relatively unimportant, especially from the perspective of the property owner.²³⁵ The important question is not what the court intended to do, but what the court in fact did. To be constitutional, a judicial decision that changes property law must pass scrutiny under both the Due Process Clause and the Takings Clause, and reviewing courts should not feel obliged to choose between the two.

²³⁰ U.S. CONST. amend. V (emphasis added).

²³¹ Peñalver & Strahilevitz, *supra* note 225, at 312, 321. Peñalver and Strahilevitz, like Barros, point to the use of the verb “deprive” in the Due Process Clause and the use of the verb “take” in the Takings Clause, as supporting their intent-based approach.

Perhaps the difference between taking property and depriving someone of property is akin to the distinction between picking someone’s pocket and, having found someone’s wallet, returning it to the wrong person. If the government imposes a loss without the intent to harness private property to accomplish a public purpose, it has not “taken” that property “for public use,” though it might still have violated the owner’s constitutional rights.

Id. at 318. (footnote omitted).

²³² *Id.* at 319.

²³³ See *id.* at 338 n.119 (pointing out that in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), nine justices supported compensation as the correct remedy for a Takings Clause violation).

²³⁴ See *id.* at 313.

²³⁵ *Robinson v. Ariyoshi*, 441 F. Supp. 559, 585 (D. Haw. 1977) (stating that “[t]he Constitution does not measure the taking of property by what a court may say or even what it may intend; the measure is by the result”). Admittedly, *Ariyoshi* was a due process case.

VII. A PROPOSED TEST FOR JUDICIAL TAKINGS

Although the disagreement between Justices Scalia and Kennedy in *STBR* was sharp, their positions can be reconciled to a certain extent. Combining certain aspects of their respective positions produces a stronger and more comprehensive standard for judicial takings.

The debate between Justices Scalia and Kennedy (over whether the Due Process Clause of the Fourteenth Amendment or the Takings Clause should apply to a state court redefinition of property) creates a false dichotomy. The mechanism by which the Bill of Rights applies to the states, the Incorporation Doctrine, suggests that both provisions should apply.²³⁶ Before 1897, the Bill of Rights applied only to the federal government and not to the states.²³⁷ But in 1897, the Supreme Court held that the Takings Clause of the Fifth Amendment applied to the states through the Due Process Clause of the Fourteenth Amendment.²³⁸ Therefore, the Takings Clause would not apply to a state judicial decision were it not for the Due Process Clause of the Fourteenth Amendment. To isolate the Takings Clause from the Fourteenth Amendment, as Justice Scalia attempted to do, is to ignore the fact that the Takings Clause applies to a state court decision only through the Due Process Clause.

Yet Justice Kennedy's position ignores the language of the Takings Clause. Written in the passive voice, the Takings Clause applies anytime the government takes private property, regardless of whether the taking is done by the legislature, the executive, or the judiciary. As Justice Scalia pointed out, Supreme Court precedent supports this reading of the Fifth Amendment.²³⁹

Furthermore, applying only the Due Process Clause to a judicial takings claim ignores the distinction the Court has drawn between the "effects" and the "underlying validity" of a governmental action that is challenged as a taking. In *Lingle v. Chevron U.S.A. Inc.*,²⁴⁰ the Court rejected the "substantially advances" test formerly applied to alleged regulatory takings.²⁴¹ Writing for a unanimous Court, Justice O'Connor declared that the "substantially advances" test, which finds a taking when a governmental regulation "does not substantially advance legitimate state interests," is "not a valid method of discerning whether private

²³⁶ See Walston, *supra* note 24, at 414.

²³⁷ See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247–51 (1833); CHEMERINSKY, *supra* note 7, at 491–92.

²³⁸ See *Chi., Burlington & Quincy R.R. Co. v. City of Chi.*, 166 U.S. 226, 241 (1897); CHEMERINSKY, *supra* note 7, at 639–40.

²³⁹ See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2601–02 (2010) (plurality opinion); see also *Webb's Fabulous Pharmacies, Inc., v. Beckwith*, 449 U.S. 155, 164 (1980); *Hughes v. Washington*, 389 U.S. 290, 296–97 (1967) (Stewart, J., concurring); *Muhlker v. N.Y. & Harlem R.R. Co.*, 197 U.S. 544, 575 (1905) (Holmes, J., dissenting); *Chi., Burlington & Quincy R.R.*, 166 U.S. at 233–34.

²⁴⁰ 544 U.S. 528 (2005).

²⁴¹ *Id.* at 540. The Court first set forth the "substantially advances" test in *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

property has been ‘taken’ for purposes of the Fifth Amendment.”²⁴² Instead, explained O’Connor, the “substantially advances” test is properly categorized as a due process analysis because “[i]t asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose.”²⁴³ A regulation that does not substantially advance a legitimate state interest “may be so arbitrary or irrational that it runs afoul of the Due Process Clause.”²⁴⁴ In contrast to due process considerations, which relate to the regulation’s “underlying validity,” the Takings Clause focuses on the regulation’s effect.²⁴⁵ Assuming a regulation is a valid exercise of governmental power, the Takings Clause requires a court to investigate whether the effect of the regulation is a taking of private property.²⁴⁶

Of course, *Lingle* dealt with a regulatory takings issue. But the basic principle set forth in *Lingle* seems equally applicable to judicial takings. *Lingle* suggests that when approaching a judicial takings claim, a court must first ascertain whether the lower court decision was a valid exercise of judicial authority under the Due Process Clause. After ensuring that due process requirements were satisfied, the court should next examine the effects of the lower court decision to see whether it constitutes a taking of private property.²⁴⁷

In the following pages, this Note explains more fully what such a two-pronged judicial takings test might look like. When describing the test, this Note uses the term “reviewing court” when referring to the court hearing the judicial takings claim and the term “lower court” when referring to the court alleged to have committed the taking. This vagueness is intentional and is designed to reinforce the point that almost any court can use the proposed test.²⁴⁸ Admittedly, the term “lower court” is not entirely accurate because a

²⁴² *Lingle*, 544 U.S. at 540, 542.

²⁴³ *See id.* at 542.

²⁴⁴ *Id.*

²⁴⁵ *See id.* at 543.

²⁴⁶ *See id.* (“Instead of addressing a challenged regulation’s effect on private property, the ‘substantially advances’ inquiry probes the regulation’s underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.”).

²⁴⁷ The U.S. District Court for the District of Hawaii employed an approach somewhat similar to the one suggested here. *See supra* Part III.C. However, the court merged the takings inquiry into substantive due process considerations. Under *Lingle*, the due process inquiry is separate from the takings inquiry.

²⁴⁸ Besides the U.S. Supreme Court, perhaps the most obvious court to use the test would be a state supreme court hearing a judicial takings claim based on a lower state court decision. A federal district court could apply the test to a judicial takings claim based on a state court decision, although various procedural issues might limit the ability of a lower federal court to hear a judicial takings claim based on a state court decision. Although it would create an unusual situation, the test could even be applied by a lower state court hearing a judicial takings claim based on a state supreme court decision. *See* Fein, *supra* note 3, at 781–82. Finally, a court could apply the substantive due process aspect of the first

situation might arise in which a federal district court or even a lower state court could hear a takings claim based on a state supreme court decision.²⁴⁹ Nonetheless, “lower court” promotes consistency and is used for that reason.

A. Due Process Prong: The “Underlying Validity” Inquiry

When a reviewing court faces a claim that a lower court decision redefined property law in such a way as to deprive the claimant of a property right, the reviewing court should first examine the decision to see whether it comports with due process. That is, it should evaluate the “underlying validity” of the lower court decision.²⁵⁰ This due process analysis must precede any examination under the Takings Clause since “the Takings Clause presupposes that” the lower court’s decision is a valid exercise of judicial authority.²⁵¹ Furthermore, the reviewing court should inquire into both the procedural and substantive aspects of due process.

1. Procedural Due Process

The procedural aspect of the Due Process Clause requires that the lower court have afforded the claimant a meaningful opportunity to be heard.²⁵² Professor Barros pointed out that a procedural due process issue is most likely to arise when a state supreme court redefines property rights.²⁵³ If a lower state court redefines property rights, the aggrieved property owner can argue his case before the state supreme court, thus allowing him a meaningful opportunity to be heard.²⁵⁴ But if a state supreme court *sua sponte* redefines property rights, the aggrieved property owner would need to either petition the U.S. Supreme Court for certiorari or petition the state supreme court for rehearing.²⁵⁵ If both petitions were denied, the property owner would be on strong ground in arguing that he was not afforded procedural due process.²⁵⁶ His only recourse in that situation would be to bring a judicial takings claim in federal district court.²⁵⁷

prong and the takings prong to a judicial takings claim brought by a third party in a collateral suit.

²⁴⁹ Various procedural issues might limit the ability of a federal district court to hear a judicial takings claim based on a state supreme court decision. These procedural issues—the *Williamson County* exhaustion requirements, the *Rooker-Feldman* doctrine, and *res judicata*—exceed the scope of this Note. For two excellent articles addressing these issues in depth, see generally Barros, *supra* note 18, and Fein, *supra* note 3.

²⁵⁰ See *Lingle*, 544 U.S. at 543.

²⁵¹ See *id.*

²⁵² See *Fuentes v. Shevin*, 407 U.S. 67, 70 (1972); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930).

²⁵³ See Barros, *supra* note 18, at 941.

²⁵⁴ *Id.* at 940.

²⁵⁵ *Id.* at 941.

²⁵⁶ *Id.*; see also Fein, *supra* note 3, at 779 (predicting that “[i]f the state supreme court’s *sua sponte* change to property law was so unpredictable and unexpected that a reasonable

2. Substantive Due Process

The Due Process Clause guarantees a substantive as well as a procedural due process right. Normally, in the realm of economic rights, substantive due process requires only that a law be “rationally related to a legitimate government purpose.”²⁵⁸ In the context of regulatory takings, the Supreme Court has stated that “a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.”²⁵⁹ Therefore, it appears that Justice Kennedy is partially right to assert that “[t]he Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights . . . is ‘arbitrary or irrational’ under the Due Process Clause.”²⁶⁰

Not just any judicial decision that alters property rights should be found to violate substantive due process requirements. Rather, borrowing from the unpredictability test suggested by Justice Stewart, only a decision that “constitutes a sudden change in state law, unpredictable in terms of the relevant precedents” should be held to violate substantive due process.²⁶¹ A state court decision that changes state law suddenly and unpredictably could easily be found so arbitrary or irrational as to violate the guarantee of due process. In the words of one author, “When changed definitions exceed certain bounds of reasonableness and fairness, the courts are constrained by constitutional due process.”²⁶²

plaintiff would not have thought to argue [a judicial takings claim] in the alternative, the plaintiff would likely have a valid procedural due process claim for lack of an opportunity to be heard”).

²⁵⁷ However, allowing a federal district court to hear a judicial takings claim based on a state supreme court decision might violate the *Rooker–Feldman* Doctrine. See Fein, *supra* note 3, at 781–82. But see Barros, *supra* note 18, at 949 (suggesting that the *Rooker–Feldman* Doctrine should not apply because “[i]n a judicial takings case . . . the complaining property owner is not arguing that the state courts simply decided a legal issue incorrectly . . . [but is instead] arguing that the state court violated the Constitution by taking property without compensation”). The two Hawaii cases, described above in Part IV, provide examples of a state supreme court denying property owners their right to procedural due process. See *id.* at 954 (citing *Sotomura v. Cnty. of Haw.*, 460 F. Supp. 473 (D. Haw. 1978); *Robinson v. Ariyoshi*, 441 F. Supp. 559 (D. Haw. 1977)). In those cases, the Hawaii Supreme Court sua sponte altered state property law in a way that deprived the property owners of property rights that they possessed before the court decisions. In both cases the federal district court found, and rightly so, that the property owners had been deprived of their procedural due process rights since they were not afforded the chance to defend their property ownership. See *Sotomura*, 460 F. Supp. at 477–78; *Ariyoshi*, 441 F. Supp. at 580.

²⁵⁸ See CHEMERINSKY, *supra* note 7, at 540.

²⁵⁹ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005).

²⁶⁰ See *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2615 (2010) (Kennedy, J., concurring in part and concurring in the judgment).

²⁶¹ *Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring).

²⁶² Walston, *supra* note 24, at 435.

State courts should be free to evolve state property law, but if they do so in an arbitrary or capricious way their decisions risk violating substantive due process requirements. Substantive due process requires that the reviewing court distinguish between state court decisions that shape property law in a principled and measured manner and decisions that effect sudden or irrational changes.²⁶³

3. *Remedy: Invalidation*

If the reviewing court finds that a lower court decision violated the Due Process Clause, it should invalidate that decision.²⁶⁴ “[I]f a government action is found to be impermissible—for instance because it . . . is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.”²⁶⁵

B. *Takings Clause Prong: The “Effects” Inquiry*

Once the reviewing court concludes that a lower court decision meets the requirements of due process, it should next analyze the decision under the Takings Clause to see whether the decision accomplished a taking of property. In the context of regulatory takings, the Supreme Court has indicated that a due process inquiry is insufficient to determine whether property has been taken under the Fifth Amendment.²⁶⁶ A takings claim requires that the reviewing court examine the lower court decision’s “effects” on private property.²⁶⁷

1. *Test*

Under this prong, the reviewing court would do well to apply the test formulated by Justice Scalia. It should find a judicial taking when “a court declares that what was once an established right of private property no longer exists.”²⁶⁸ Under Justice Scalia’s test, a taking can be found even if the lower court decision was not so arbitrary or irrational as to run afoul of substantive

²⁶³ See Barros, *supra* note 18, at 938.

²⁶⁴ See Walston, *supra* note 24, at 435–36.

²⁶⁵ Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 543 (2005); see also Barros, *supra* note 18, at 954 (observing that “inverse condemnation . . . can only be had in a case involving a taking under the Just Compensation Clause, and should not be available for cases seeking redress for deprivations of property in violation of substantive or procedural due process”).

²⁶⁶ See Lingle, 544 U.S. at 542.

²⁶⁷ See *id.* at 543.

²⁶⁸ Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot., 130 S. Ct. 2592, 2602 (2010) (plurality opinion) (emphasis omitted); cf. Barros, *supra* note 18, at 917. Professor Barros argues that “there is no need for a unique test for judicial takings. A judicial action should be considered a taking under the Just Compensation Clause if the equivalent action would be a taking if performed by the legislature or the executive branch.” See *id.*

due process.²⁶⁹ “What counts is not whether there is precedent for the allegedly confiscatory decision, but whether the property right allegedly taken was established.”²⁷⁰ If the reviewing court is a federal court, when employing Justice Scalia’s test it should be careful to follow his rule of deference to the state court’s interpretation of state property law.²⁷¹ Only if the right was clearly established under state law should the federal court find a judicial taking.

The reviewing court should not simply apply to a judicial takings claim the same takings analysis used for regulatory takings.²⁷² Justice Scalia’s established right test recognizes the fundamental difference between a judicial taking and a regulatory taking. When a court issues a decision, it usually goes to great pains to reconcile its holding with preexisting law.²⁷³ Almost never will a court blatantly proclaim that its decision effected a dramatic change in the law. When a state legislature enacts a statute, however, a reasonable assumption is that the statute is a departure from preexisting law.²⁷⁴ Legislators enact statutes because they want to change the law. A judicial takings test should therefore be tailored to address this basic difference between court decisions and statutes.²⁷⁵ Justice Scalia’s test is well designed to ferret out cases where a court, although claiming that its holding is consistent with prior law, has in reality changed the law in such a way as to take property.

The reviewing court should apply this takings analysis only to those court decisions that turn private property into public property. As discussed above, Barros suggested that in the judicial takings context, the Takings Clause applies only to situations in which a court has turned a previously private property right

²⁶⁹ See *Stop the Beach Renourishment*, 130 S. Ct. at 2610 (plurality opinion).

²⁷⁰ *Id.*

²⁷¹ See *id.* at 2608 n.9.

²⁷² But see Barros, *supra* note 18, at 917.

²⁷³ See Sarratt, *supra* note 179, at 1490 (observing that “[i]t is in the nature of courts to say what the law is and what it has always been”).

²⁷⁴ *Id.* at 1491 (observing that “[s]tatutes are, generally speaking, assumed to be new rules replacing common law background principles”); see also *Munn v. Illinois*, 94 U.S. 113, 134 (1876) (stating that “the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstance”).

²⁷⁵ Barros recognizes this basic difference between judicial takings and legislative or executive takings. He observes:

The judicial takings fact pattern, however, does present some unique issues that typically are not present in equivalent cases involving the legislature or executive branch. If any of the branches made an explicit change in property law, then a reviewing federal court would have relatively little difficulty in evaluating the constitutionality of this change. If the change were implicit, however, a constitutional review would require interpretation of the state’s property law.

Barros, *supra* note 18, at 932. Nonetheless, he does not view this difference as supporting a unique test for judicial takings. See *id.*

into a public property right.²⁷⁶ Private-private transfers should be analyzed under the Due Process Clause.²⁷⁷

2. *Remedy: The State's Choice*

If a reviewing court finds that a court decision accomplished a judicial taking in violation of the Fifth Amendment, it should allow the state to decide whether to invalidate the court decision or to uphold the decision and provide just compensation. When the Supreme Court finds a regulatory taking, it leaves it up to the state government to decide whether to revoke the regulation or exercise eminent domain.²⁷⁸ A reviewing court should take the same approach in the judicial takings context. If the state court decision complied with due process but nonetheless accomplished a taking, under the Fifth Amendment the only problem with the court's action is that the taking was uncompensated. The Supreme Court has explained that the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power."²⁷⁹ The Takings Clause allows a governmental entity to take property so long as it provides compensation.²⁸⁰ If, as Justice Scalia argued, the Takings Clause applies to the judicial branch as well as to the legislative and executive branches, the remedy for a judicial taking should be the same as the remedy for a legislative or executive taking.

Thompson's suggested remedies are valuable here. As discussed earlier,²⁸¹ he suggested two possible approaches to remedying a judicial taking—the Automatic Compensation Approach and the Legislative Choice Approach.²⁸² Of the two, the Legislative Choice Approach is preferable in that it gives the state legislature the final say on whether the state will pay compensation to accomplish a constitutional taking. Under this approach, the reviewing court sets a deadline by which the state legislature must award compensation for the judicial taking.²⁸³ If the legislature declines to award compensation before the deadline, the lower court decision is invalidated.²⁸⁴ According to Thompson, the advantage of this approach is that "[t]he legislature remains free to decline paying compensation if it wishes. But, if the legislature chooses not to

²⁷⁶ See *id.* at 919; see also *supra* Part VI.C.

²⁷⁷ See *supra* text accompanying notes 223–30.

²⁷⁸ *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 321 (1987) (stating that "[o]nce a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain").

²⁷⁹ *Id.* at 314.

²⁸⁰ See *id.*; see also Echeverria, *supra* note 159, at 482 (describing "Justice Scalia's assertion that the remedy for judicial takings should not be limited to financial compensation" as "anomalous").

²⁸¹ See *supra* Part VI.A.

²⁸² Thompson, *supra* note 24, at 1513.

²⁸³ *Id.* at 1522.

²⁸⁴ *Id.*

compensate, the state does not retain the benefit of the judicial property change.”²⁸⁵

VIII. THE TWO-PRONGED TAKINGS TEST APPLIED

A brief example will illustrate how this proposed two-pronged test would apply to a judicial takings claim. Consider the facts of the well-known beach-access case *Matthews v. Bay Head Improvement Ass'n*.²⁸⁶ The case involved a dispute over the public's right to access a beach owned by a “quasi-public body.”²⁸⁷ The Bay Head Improvement Association (BHIA) was a private, nonprofit corporation that owned and leased several parcels of land along the New Jersey shore.²⁸⁸ The BHIA maintained the beaches for the benefit of its members, the residents of the Borough of Bay Head.²⁸⁹ During the summer, only members were allowed to use the beaches during the daytime.²⁹⁰ Unhappy with this restricted membership, the nearby Borough of Point Pleasant sued the BHIA, seeking access to the BHIA's beaches for Point Pleasant residents.²⁹¹ Under the public trust doctrine as it existed in New Jersey before *Matthews*, the public had the right to use the foreshore²⁹² for navigation and fishing as well as for recreational uses such as swimming.²⁹³ Also, the public had the right to enjoy the dry sand area²⁹⁴ of beaches owned by municipalities.²⁹⁵ However, the public did not have the right to use the dry sand area of privately owned beaches.

²⁸⁵ *Id.* at 1520–21.

²⁸⁶ 471 A.2d 355 (N.J. 1984).

²⁸⁷ *Id.* at 358. Admittedly, the quasi-public nature of the BHIA might factor into a reviewing court's takings analysis. For purposes of this illustration, though, assume the court would treat the BHIA as a normal private landowner.

²⁸⁸ *Id.* at 359.

²⁸⁹ *Id.*

²⁹⁰ *Id.* The public was allowed to use the beach in the early morning and evening. *Id.*

²⁹¹ *Id.* at 358. Two individuals, a resident of Point Pleasant who wanted to swim at Bay Head and a Public Advocate, joined as plaintiffs. *Id.* The Borough of Point Pleasant eventually “ceased pursuing the litigation” and “the Public Advocate became the primary moving party.” *Id.*

²⁹² The foreshore is “the land below the mean average high water mark where the tide ebbs and flows.” *Matthews*, 471 A.2d at 362–63.

²⁹³ See *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972) (holding that “the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities”).

²⁹⁴ “The dry sand area is generally defined as the land west (landward) of the high water mark to the vegetation line or where there is no vegetation to a seawall, road, parking lot or boardwalk.” *Matthews*, 471 A.2d at 358 n.1.

²⁹⁵ See *Van Ness v. Borough of Deal*, 393 A.2d 571, 573 (N.J. 1972) (holding that “in New Jersey, a proper application of the Public Trust Doctrine requires that the municipally owned upland sand area adjacent to the tidal waters must be open to all on equal terms and without preference”).

In *Matthews*, the New Jersey Supreme Court extended the public trust doctrine to privately owned dry sand beaches.²⁹⁶ It held that the public trust “doctrine warrants the public’s use of the [privately owned] upland dry sand area subject to an accommodation of the interests of the owner.”²⁹⁷ Essentially, then, by extending the public trust doctrine to privately owned dry sand areas, the court deprived private beach owners—in this case the BHIA—of a property right, namely, their right to exclude the public from the dry sand area of their property.

The facts of *Matthews* are amenable to the two-pronged judicial takings test proposed in this Note.²⁹⁸ The reviewing court would first apply the “underlying validity” prong of the test. As noted earlier,²⁹⁹ a case where a state supreme court decision accomplishes the alleged taking will often create an issue of procedural due process. Whether the parties actually argued the extension of the public trust doctrine is unclear from the case itself. If the BHIA was afforded an opportunity to contest the extension of the public trust doctrine, the requirement of a meaningful opportunity to be heard would likely be satisfied. But if the court decided the issue *sua sponte* and denied a petition for rehearing, its actions might have violated procedural due process. If so, the reviewing court would invalidate its decision.

Assuming the reviewing court found that the New Jersey Supreme Court complied with procedural due process, it would next evaluate the decision under the substantive aspect of due process. It would look at New Jersey property law before *Matthews* to see whether *Matthews* effected a sudden, unpredictable change in the law. Since the New Jersey Supreme Court had been steadily expanding the public trust doctrine before *Matthews*—first to recreational uses of the foreshore and then to municipally owned dry sand areas—the *Matthews* decision does not appear so arbitrary or irrational as to violate due process. Rather, it looks as though the New Jersey Supreme Court was simply taking the next logical step in its gradual expansion of the public trust doctrine. State courts must be permitted to shape their own property law in a principled manner. The reviewing court would most likely not find a violation of substantive due process on these facts.

²⁹⁶ *Matthews*, 471 A.2d at 365.

²⁹⁷ *Id.* The court went on to say:

While the public’s rights in private beaches are not co-extensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand.

Id. at 365–66. The court also required the BIHA, as a “quasi-public” organization, to open up its membership to the general public. *See id.* at 367.

²⁹⁸ The BHIA actually did petition the U.S. Supreme Court for a writ of certiorari, but its petition was denied. *See Bay Head Improvement Ass’n v. Matthews*, 469 U.S. 821 (1984) (mem.).

²⁹⁹ *See supra* Part VII.A.1.

If it found that the *Matthews* decision passed the first prong of the test, the reviewing court would move to the “effects” prong. Here it would ask whether the decision eliminated an established right of private property. Whether the decision was predictable or foreseeable is irrelevant under this prong of the test. The key issue is whether the decision turned an established private property right into a public property right. Before *Matthews*, the BHIA had the right to exclude the public from the dry sand area of its beaches. After *Matthews*, it was required to grant the public reasonable access to the dry sand. *Matthews*, therefore, declared that the BHIA’s right to exclude no longer existed. Because it took the BHIA’s property right without providing compensation, the New Jersey Supreme Court violated the Takings Clause of the Fifth Amendment.

After finding that the *Matthews* decision was an unconstitutional taking of property, the reviewing court would give the New Jersey legislature the option of providing compensation. If the legislature decided that the benefits of granting the public access to the dry sand areas of its shoreline were worth the cost, it would compensate the taking. The taking would then be constitutional. But if the legislature decided not to provide compensation, the *Matthews* decision would be invalidated. In the end, the choice would be the state’s to make.

IX. CONCLUSION

STBR indicated that the Supreme Court will not allow a state court to alter property law in such a way that it takes private property. Unfortunately, the Court provided little guidance for courts faced with judicial takings claims. This Note has proposed a two-pronged test that reviewing courts should apply when resolving a judicial takings claim. By applying both an “underlying validity” inquiry and an “effects” inquiry, each with a distinct remedy, the reviewing court will ensure that each judicial takings claim receives a comprehensive and principled constitutional analysis.

